IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1721

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John J. Paylor
P. O. Box 6419
2700 Terminal Tower
Cleveland, Ohio 44101

John A. Daily
1138 6 Penn Center Plaza
Philadelphia, Pa. 19104

Peter J. Hunter, Jr.
8 North Jefferson Street
Roanoke, Virginia 24042
Counsel for Eastern Railroads

Howard J. Trienens
R. Eden Martin
James W. Jandacek
One First National Plaza
Chicago, Illinois 60603

Smith R. Brittingham, Jr.
304 Cavalier Drive
Virginia Beach, Virginia 23451

Joseph D. Feeney
222 South Riverside Plaza
Chicago, Illinois 60606
Counsel for Western Railroads

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Petitioners, The Atchison, Topeka and Santa Fe Railway Company, et al.,[1] request this Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 549 F. 2d 1186, and appears at Appendix A (*infra*, App. pp. a-1, *et seq.*).

[1]Railroad Petitioners are listed in Attachment A of this Petition, *infra* at p. A-1.

The Administrative Law Judge's initial decision appears at Appendix D (*infra*, App. pp. d-1, *et seq.*); the decision of the Interstate Commerce Commission ("Commission") affirming and adopting that initial decision appears at Appendix C (*infra*, App. pp. c-1, *et seq.*).

JURISDICTION

The opinion and judgment of the Court of Appeals were entered February 24, 1977 (App. A). A timely Petition for Rehearing was denied on March 31, 1977 (App. B). This Court has jurisdiction under 28 U.S.C. §§1254(1), 2350(a).

QUESTION PRESENTED

The railroad grain rate structure has been in effect for many decades and is relied upon by shippers and communities throughout the country. Proportional rates (which are portions of through rates) are an integral part of the railroad grain rate structure as prescribed by the Interstate Commerce Commission and affirmed by this Court. *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534 (1942). This Court has expressly ruled that the railroads do not violate Section 2 of the Interstate Commerce Act (prohibiting rebates and other unjust discrimination against shippers) by according proportional rates, which are lower than local or flat rates, to through grain shipments via rail but not according proportional rates to non-through shipments via water or motor carrier. *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U.S. 671 (1943). In 1940 Congress amended the Interstate Commerce Act to accord through route status with railroads to water carriers (but not to motor carriers), and proportional rates were thus made available to water carriers. *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947).

In the present case, the Chicago Board of Trade sought a ruling that if proportional rates were to be applied on the outbound rail movements from Chicago of through rail-rail or barge-rail grain

shipments, then they must also be applied on the outbound rail movements of grain which is trucked into Chicago and then moves outbound by rail to Eastern destinations. Although it was uncontroverted that such an action would disrupt and destroy the railroad grain rate structure, the Commission and the Court of Appeals agreed with Chicago Board of Trade, holding that under this Court's decision in *Mechling*, proportional rates could not be applied to through rail-rail or barge-rail shipments unless they were also applied to outbound rail movements of trucked-in grain.

The question presented is whether the 1947 decision of this Court in *Mechling* dealing with water carriers compels disruption of the railroad grain rate structure by prohibiting application of proportional rates on through rail-rail or barge-rail grain movements unless those proportional rates are also applied to trucked-in grain.

STATUTE INVOLVED

Section 2 of the Interstate Commerce Act (49 U.S.C. §2) provides:

> "§2. Special rates and rebates prohibited.
>
> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

STATEMENT OF THE CASE

This case involves railroad freight rates known as "proportional rates" applicable to shipments of wheat or wheat products for the balance of through movements by rail eastbound from Chicago, Illinois, to destinations in the Eastern United States.

A proportional rate is *part of* a through rate, applicable to a portion of a through movement via two or more carriers over a through route.[2] A rail shipper of wheat from a country origin in Nebraska, for example, may ship wheat to New York over a through route via the Union Pacific to Omaha, thence Chicago and North Western to Chicago, thence ConRail to New York. The through rail rate for a shipment over this through route is less than the sum of the three local or flat rates of the three railroads—*i.e.*, country origin to Omaha, Omaha to Chicago, and Chicago to New York. The proportional rate applicable to that part of the through rail movement from Chicago to New York is less than the local or flat rate for local service from Chicago to New York.

At the time the record in the Commission proceeding was made, the proportional rate applicable to that portion of the through movement of wheat or wheat products eastbound from Chicago to New York City was 81.5 cents per hundredweight (App. p. d-38). Because the railroads maintain through routes and rates with other railroads, lake vessels, and barges, the proportional rate for eastbound rail service from Chicago applied whether the inbound movement to Chicago was by rail, lake vessel, or barge (App. p. d-4). Other proportional rates apply to Eastern points other than New York City (App. p. d-2).

[2]Through routes exist where the carriers arrange or hold themselves out, expressly or impliedly, to perform continuous service from a point on the line of one carrier to a destination on the line of another. *Thompson* v. *United States*, 343 U.S. 549, 557 (1952); *St. Louis S.W. Ry.* v. *United States*, 245 U.S. 136, 139 n.2 (1917).

However, if the movement was *not* a through movement and did not qualify for the proportional rate, then the local or flat rate from Chicago to New York would apply. The local rate from Chicago to New York for wheat was 98 cents; and the local rate for wheat products was 100.5 cents (App. p. d-38).

The railroads do not maintain through routes with motor carriers for movements of grain via Chicago to the East. Thus, wheat and wheat products arriving at Chicago by truck ("trucked-in wheat") and moving eastbound by rail to New York would take the local rate rather than the proportional rate.[3]

Background of This Case

The railroads' practice of applying through rates (including proportional rates) to through shipments via through routes, and of applying higher local or flat rates to non-through or local movements over exactly the same lines of railroad, has been followed since the very beginnings of the railroad industry. Section 2 was a part of the Interstate Commerce Act as originally enacted in 1887. Proportional rates applicable to portions of through movements over through routes but not to local movements were in existence when the Act was passed, and have continued in existence ever since. Congress has specifically authorized proportional rates.[4] No court has ever before held that such restriction of proportional rates to through movements is unlawful under Section 2 or any other provision of the Act.[5]

[3]Other wheat which arrives at Chicago as part of a non-through movement (e.g., wheat arriving at Chicago on intrastate rail rates and wheat which has forfeited its transit privileges) likewise would take the local eastbound rail rate.

[4]Section 6(11)(b) of the Act (49 U.S.C. §6(11)(b)) authorizes the Commission to prescribe ex-water proportional rates.

[5]This court has recognized that through rates may lawfully be lower than the sum of the local rates over the same line. *United*

(footnote continued on next page)

Indeed, the Commission has not only held that proportional rates may be limited to through routes, but has made it plain that by definition a proportional rate is a *part of* a through rate. Thus, in *Kansas City Transportation Bureau* v. *Atchison, T. & S.Fe Ry.*, 16 I.C.C. 195 (1909), the Commission held that a "proportional rate means a part of or a remainder of the through rate or it means nothing at all. . . ."[6] The courts have likewise recognized that a proportional rate is "simply a part of a through rate," and that "the propriety and lawfulness of proportional rates . . . which are less than local rates . . . have frequently been affirmed by the Interstate Commerce Commission and are sanctioned by considerations of public policy." *Hocking Valley Ry.* v. *Lackawanna Coal & Lumber Co.*, 224 F. 930, 931 (4th Cir. 1915); *see also Great Northern Ry.* v. *Sullivan*, 294 U.S. 458, 460 (1935).

The legal validity of proportional rates as applied only to movements over through routes (but not to non-through or local movements) has not only been approved by the Commission, but such rates have been *prescribed* by the Commission and sustained by this Court in the context of the very grain rate structure which

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States v. *Great N. Ry.*, 343 U.S. 562, 566 n.2 (1952); *Parsons* v. *Chicago & N.W. Ry.*, 167 U.S. 447, 457–58 (1897); *ICC* v. *Baltimore & O.R.R.*, 145 U.S. 263, 276–77, 279 (1892). *Cf. Union Pac. Ry.* v. *United States*, 117 U.S. 355, 362–63 (1886).

[6]This view has been repeatedly reaffirmed and followed by the Commission. *See, e.g., Ex-River Grain From St. Louis To The South*, 203 I.C.C. 385, 390 (1934) ("Proportional rates are factors of through rates"); *Indian Refining Co.* v. *Louisville & N.R.R.*, 155 I.C.C. 380, 381 (1929) ("A proportional rate is restricted to apply on through traffic. Through and local traffic are clearly distinguishable."); *Frederichsen Floor & Wall Tile Co.* v. *Atlantic C.L.R.R.*, 146 I.C.C. 786, 791 (1928) ("We have considered proportional rates in numerous cases and it is well settled that they are inseparably connected with and form parts of the rates applying to through transportation.").

is involved in this case.[7] In *Grain and Grain Products Within the Western District and For Export*, 205 I.C.C. 301 (1934), the Commission constructed the basic grain rate structure as it exists today by *prescribing* local rates from producing areas to the intermediate markets, and "proportional rates, lower than the flat rates, from those markets to final markets and other destinations . . . [and] through rates equal to the combinations of the inbound flat rates and outbound proportionals, the so-called 'rate-break combinations' " (205 I.C.C. at 327–28). This decision of the Commission requiring use of proportional rates on through routes and movements outbound from the intermediate markets was sustained by this Court in *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534 (1942).

This Court's Decision in *Inland Waterways*

At about the time the Commission was prescribing proportional rates in the proceeding which led to this Court's decision in *Board of Trade of Kansas City*, a controversy arose as to whether grain which moved from country stations into Chicago was entitled to move east by rail on the proportional part of the through rate if that grain arrived at Chicago by a carrier which did not maintain through routes with the railroads. The facts with respect to that controversy were virtually identical to those involved here. Grain moved into Chicago not only via interstate rail movements, but also by barge, or truck, or intrastate rail movements. Some of this grain was stored in Chicago elevators and processed in Chicago plants—just as it is today. Some of the grain or the grain products then moved on to Eastern destinations over the same rail lines used today. The physical characteristics of the outbound rail movement and the service performed by the Eastern railroads were the same no matter how the grain arrived at Chicago—and

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[7]Proportional rates on wheat from the Midwest moving through Chicago have existed since at least 1905. *Baltimore Chamber of Comm.* v. *Baltimore & O.R.R.*, 22 I.C.C. 596, 598 (1912).

that similarity of physical characteristics on the outbound rail movement remains the same today.

Inland Waterways Corporation filed a complaint with the Commission asserting that the Eastern railroads were required by Section 2 and other sections of the Act to apply the proportional rates to the ex-barge grain. This contention was based on the fact that "the physical carriage beyond Chicago was substantially the same, no matter where the grain originated" (319 U.S. at 683). The Commission rejected the barge lines' contention in *Grain Proportionals, Ex-Barge to Official Territory*, 248 I.C.C. 307, 311 (1941):

> "Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory, and unduly prejudicial . . . and unduly preferential. . . . This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates, although in each instance the physical carriage beyond the reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forfeited its transit privileges. *To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned.* As pointed out by the division, reshipping or *proportional rates are in their essence balances of through rates.* Such balances are, of course, determined by the measure of the in-bound and through rates, and *properly may vary according to the relative length and nature of the in-bound and through service.* It follows that the protestants' allegations cannot be sustained in this proceeding. . . ." (Emphasis supplied.)

Inland Waterways Corporation appealed from the Commission's decision, repeating its argument that application of proportional rates on through routes and movements (ex-rail or ex-lake) without likewise applying the proportional rates where *no* through route or movement then existed (ex-barge) was a discrimination

prohibited by Section 2. As this Court stated the matter, Inland Waterways "pitched their case" upon the proposition that "[t]o deny the ex-barge grain the benefit of proportionals sought to be cancelled was necessarily unlawful since the physical carriage beyond Chicago was substantially the same, no matter where the grain originated" (319 U.S. at 683).

This Court in *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U.S. 671 (1943), ruled squarely that it is *not* a violation of Section 2 for the railroads to decline to apply the proportional part of the through rate on grain shipments where no through routes or through rates exist. Movements by barge and thence rail were not at that time deemed to be movements over through routes, either by virtue of agreements between the barge lines and the railroads or by any provisions of the Interstate Commerce Act. Accordingly, this Court held that the Commission had "correctly" ruled that to adopt Inland Waterways' contention on the ground that the physical character of the outbound rail movement was the same regardless of how the grain arrived at Chicago would be to condemn proportional rates (319 U.S. 684):

> "As the Commission correctly observed with reference to the first contention, 'to adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned.' "

The Court rejected any such condemnation of proportional rates, holding that application of lower, proportional rates on through routes and movements, but not applying such rates on non-through movements, was a well-established practice "deeply embedded in the transportation system of the country," and one approved by the Commission, the courts, and by Congress (319 U.S. 684–85).[8]

[8]Under the rate schedules at issue in *Inland Waterways*, the proportional rates applied to ex-rail grain from Illinois, and such

(footnote continued on next page)

The Transportation Act of 1940 and This Court's Decision in *Mechling*

The Transportation Act of 1940 (the "1940 Act") changed the status of barge carriers. In the 1940 Act, Congress imposed a duty upon rail carriers and barge carriers to establish through routes with each other, and through rates applicable thereto, and specifically provided that rail and water carriers shall be "connecting lines" as that term is used in Section 3(4) of the Act. Also, the Commission was empowered to prescribe through routes and rates for through barge-rail traffic. It followed from these amendments that railroads were forbidden by Section 2 and other sections of the Act from charging a shipper by barge-rail a higher proportional rate than a shipper by rail-rail for the same through rail service over the same through route.

In *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947), this Court was presented with a case involving the same physical facts as those involved in *Inland Waterways*. The

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locations as St. Louis and Kansas City when reshipped from Chicago to Central, Trunk Line, and New England Territories, but grain from *exactly the same origins* would be charged the higher local rate if brought to Chicago by barge (see 319 U.S. at 675–76; and *Grain Proportionals, Ex-Barge To Official Territory*, 246 I.C.C. 353, 355–56, 365–66 (1941); 248 I.C.C. at 309–10). Thus, the rate from Chicago to an eastern destination on grain from the same origin would vary solely on the basis of the mode and nature of transportation into Chicago. Therefore, contrary to the premise of the opinion of the Court of Appeals below that *Inland Waterways* focused "more on the origin of the grain as the basis of the discrimination than on the mode of transportation into Chicago" (App. p. a-10), in *Inland Waterways* it was the *mode* of inbound transportation—whether a through rail movement over a through route, or a barge-rail movement not (at that time) over a through route—which resulted in application of different rates to grain which had been brought to Chicago from exactly the same origins.

only change since *Inland Waterways* was that by virtue of the 1940 Act, barges had been accorded through status with railroads. This Court therefore ruled in *Mechling* that through movements by barge-rail were entitled to the same through rate treatment as through rail-rail movements.

Proceeding Before the Interstate Commerce Commission

The instant case does not involve barge-rail grain or any other through grain movements. It involves grain that moves into Chicago by truck. Congress has *not* accorded trucks the status of "connecting lines" with railroads. Likewise, Congress has *not* imposed upon either the railroads or water carriers any duty to establish through routes and rates with motor carriers; and it has *not* empowered the Commission to prescribe through routes and rates with respect to traffic moving in part by truck and in part by rail or barge.[9]

The proceeding before the Commission was instituted by the filing of a complaint on behalf of the Chicago Board of Trade seeking an order which would require the Eastern railroads to apply their proportional rates for service eastbound from Chicago to wheat which arrived at Chicago by truck (App. p. d-3). The railroads opposed the complaint on the ground that they were not required to, and did not, maintain through routes with motor carriers, and that therefore the ex-truck wheat was not entitled to the lower proportional parts of through rates but instead should move on the local rates applicable to rail shipments originating at Chicago.

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[9]When grain moves from country origins by truck to an intermediate point from which it is forwarded by rail or barge, there is no through status between the truck and the rail or barge line, and no through route or through rate from the truck origin to the rail or barge destination. In contemplation of law, it is as if the trucked-in grain had been grown at the point where it was tendered to the rail or barge line.

The Administrative Law Judge ruled that maintenance of local rates on ex-truck wheat higher than proportional rates applicable on ex-rail, ex-lake and ex-barge wheat was unjustly discriminatory in violation of Section 2 because the physical characteristics of the transportation services performed by the Eastern railroads were substantially the same whether the wheat had been hauled in by truck, rail, or water carrier (App. p. d-30). In making this ruling the Administrative Law Judge did not draw upon any expertise in the field of transportation, nor did he consider the disruptive effect his decision would have on the grain rate structure throughout the country. Instead, he based his decision solely on the ground that it was compelled by this Court's decision in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947), and *James McWilliams Blue Line, Inc.* v. *United States*, 100 F.Supp. 66 (S.D.N.Y. 1951), *aff'd per curiam*, 342 U.S. 951 (1952), citing *Mechling*. The Administrative Law Judge stated: "The present situation cannot be distinguished from the *Blue Line* and *Mechling* cases" (App. p. d-29). Based solely on his construction of these decisions, the Administrative Law Judge ordered the Eastern railroads "to maintain and apply, rates and charges removing the unlawful discrimination herein found to exist" (App. p. d-32). Thereafter, Division 2 of the Commission, with only two of its three members participating, and without rendering any separate opinion, adopted and affirmed the Initial Decision (App. p. c-2). The full Commission declined to review the action of Division 2.

The Decision of the Court of Appeals

On February 24, 1977, the United States Court of Appeals for the Eighth Circuit, having jurisdiction under 28 U.S.C. §§2321, 2342, denied the railroads' petition for review.[10] The Court of Appeals, like the Commission, based its decision solely on this

[10]American Bakers Association, Anheuser-Busch, Inc., and The Board of Trade of Kansas City, Missouri, Inc., were granted leave to intervene and participated as petitioners.

Court's holdings in *Mechling* and *Blue Line* (App. p. a-10). The Court of Appeals acknowledged this Court's decision in *Inland Waterways*, but ruled that "to the extent that *Inland Waterways* is inconsistent with *Mechling* and *Blue Line*, we are bound by the Supreme Court's latest pronouncements as reflected in the latter" (App. pp. a-10, a-11).

The Court of Appeals also dismissed contentions that the Commission's decision would disrupt the national grain rate structure on the theory that such disruption, even if inevitable, was irrelevant because the Commission's decision was "mandated" by the decisions of this Court (App. p. a-11, n.9):

> "Petitioners additionally contend that the Commission erred in failing to consider the disruptive consequences of its decision on the national grain rate structure. In view of our holding that the Commission's decision was mandated by *Mechling* and *Blue Line*, we find no merit to this contention."

A petition for rehearing was denied by the Court of Appeals (App. p. b-1).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

An important factor to be considered by the Court in passing upon a petition for certiorari is whether it appears that a court of appeals "has decided a federal question in a way in conflict with applicable decisions of this court. . . ." (Rule 19(1)(b)). This Court has frequently granted certiorari to consider petitioners' claims that a court of appeals has misconceived the meaning or scope of a previous decision of this Court. *See, e.g., Federal Trade Commission* v. *Texaco, Inc.*, 393 U.S. 223, 225 (1968). *Wilkinson* v. *United States*, 365 U.S. 399, 401 (1961); *Schlude* v. *Commissioner*, 372 U.S. 128, 130 (1963).

The considerations favoring the granting of certiorari are strengthened where an important issue of statutory construction

or application is at stake; *see, e.g., Federal Communications Commission* v. *WOKO, Inc.,* 329 U.S. 223, 226 (1946); *United States* v. *Ruzicka,* 329 U.S. 287, 288 (1946); or where a decision of a court of appeals is inconsistent with decades of settled construction and practice by affected parties; *see Patterson* v. *Lamb,* 329 U.S. 539, 541 (1947); or where a case involves principles "the settlement of which is of importance to the public. . ." *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923); *see also United States* v. *United Mine Workers of America,* 330 U.S. 258, 269 (1947).

Under these standards certiorari should be granted in this case. The decision of the Court of Appeals is based solely on its construction of an important statutory provision, Section 2 of the Interstate Commerce Act—a construction directly contrary to the construction given that same section by this Court in *Inland Waterways.* Moreover, the Court of Appeals' decision, if not reviewed and reversed, would result in the disruption, if not total destruction, of the nation's historic grain rate structure—a rate structure which has long been relied upon by shippers, grain storage facility operators, and processors, and communities throughout the country. This disruption would be caused by invalidation of proportional rates, which have in the past been prescribed by the Commission and the use of which has been repeatedly sanctioned by this Court.

Review by this Court is particularly appropriate in this case where the Court of Appeals based its decision on its misunderstanding that such disruption is "mandated" by this Court's decision thirty years ago in *Mechling* (and a subsequent case decided on the basis of *Mechling*).

I.

The Historic Grain Rate Structure Should Not Now Be Disrupted On The Theory That A Decision Of This Court Thirty Years Ago "Mandates" Such A Result Without Review By This Court.

Proportional rates are components of through rates, and are essential elements of the highly complex grain rate structure now in effect throughout the grain producing and shipping areas of the United States. The elements of this structure are integrally related to each other because of the factor of competition among shippers, carriers, markets, and processors. Thus, any change in the rate structure in one area threatens changes in the structure elsewhere, and disruption of existing commercial relationships between shippers, processors, markets, and consumers.

This rate structure is designed to equalize transportation charges, which are an important determinant of commercial opportunities for competing businesses located at different gateways and market places, and to reflect other competitive relationships.[11] Substantial investments are made in storage facilities, processing plants, and commercial and marketing arrangements in reliance on existing patterns of flow of grain from country origins, through processing points and markets, and thereafter to ultimate destinations. If the rates to and from one marketplace are altered in relation to the rates to and from other marketplaces, or if the rate structure is otherwise changed, then the flow of grain shifts, existing competitive relationships are disrupted, and the storage facility operators, processors, and transportation companies serving one market benefit at the expense of those operating at other markets.

[11]The principal midwestern rail gateways to the east are Chicago, St. Louis, and Peoria. Railroads serving these principal gateways maintain local rates for service originating at these gateways to points in the east. They also maintain proportional

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The Commission in its general investigation of the grain rate structure in Docket No. 17,000, Part 7, recognized the delicately-balanced, interrelated character of the grain rate structure (*Grain and Grain Products Within the Western District and For Export,* 164 I.C.C. 619, 697 (1930)):

> "In some respects, in a traffic sense, wheat is the most liquid commodity known in transportation. The classes or grades of wheat have long been standardized and, commercially, wheat approximates currency. The rate structure should permit it to move freely in all directions. Rates on wheat are closely related to one another, and *even a slight change in one will ordinarily affect the movement governed by the others.* In fact, generally speaking, all the rates on wheat may be likened to a huge blanket covering the entire country, and *a pull on any part of this blanket* to the extent of 1 or 2 cents, sometimes even a fraction of a cent, *will be felt in every other part.*" (Emphasis supplied.)

Given that a "slight" change in rates would be felt in every other area blanketed by the rate structure, the effect of totally invalidating a very substantial underpinning of that structure would be far more destructive.

As this Court observed in *Inland Waterways*, 319 U.S. at 684–85, the practice of applying proportional rates only to through movements via through routes but not to non-through or local movements is "deeply embedded in the transportation system of the country." (*Supra*, p. 9.) Where proportional rates thus

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rates as part of through rates for service on traffic originating at points west of the gateways, moving to gateways for processing and storage, and then moving on the proportional part of the rate to the Eastern destinations. Competition among the railroad lines has produced an approximate equalization of these through rates on through routes over these three gateways to points in the east. Also equalized are the through rates to the east from certain interior markets other than the principal gateways, such as Minneapolis, Omaha, and Kansas City.

applied have for decades been one of the essential elements of the grain rate structure having the approval of the Commission and this Court (*supra*, p. 7), this practice should not now be invalidated as a violation of Section 2 of the Act without full review by this Court.

It is undisputed that the grain rate structure and commercial relationships which depend upon that structure *will be* seriously disrupted if the Commission's decision becomes effective.[12] Indeed, the Commission's own Special Projects Staff recently recognized in a pending proceeding that the Commission in the instant case had failed to consider the serious ramifications of its orders herein and urged that the Commission withhold its order until the impact of the decision on transportation of grain could be thoroughly explored. In *Ex Parte 270, Sub No. 9*, which is a plenary investigation of the national grain rate structure, the

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[12]Such disruption would inevitably lead to further extended Commission proceedings and litigation both as to the Eastern railroads' rates applicable to eastbound traffic from Chicago, and as to other rates applicable to other grain movements in other sections of the country. Following the Commission's decision in this case, the Eastern railroads undertook to remove the discrimination found to be unlawful by cancelling "all of their proportional rates on grain and grain products, including wheat and wheat products, applicable from origins throughout Central Territory." (Petition Seeking Modification of Effective Date, p. 6). The result of this action would be to apply the higher local rates to all traffic, including trucked-in wheat. However, when the Commission stayed the effective date of its order pending judicial review, the Eastern railroads postponed further action on this proposal. Chicago Board of Trade, on the other hand, wants the supposed discrimination eliminated by applying the lower proportional rates to all traffic, including the trucked-in wheat, and has predicted that the railroads' effort to cancel their proportional rates would meet with "widespread opposition" and result in suspension and investigation by the Commission. (Chicago Board of Trade, brief in Court of Appeals, p. 35.)

Commission's Special Projects Staff in its Opening Statement dated March 1, 1976, stated as follows (pp. 2, 199, 202):

> "This ruling [in the instant Chicago Board of Trade case] may result in a *significant modification of the historic pattern of gathering rates from country origins and intermarket proportionals* currently charged by the nation's railroads for the shipment of grain and grain products."
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> * * *
>
> "Since, as we have pointed out in our history of the rate relationships for these commodities, the grain rate fabric is extremely complex and inter-related, the adjustment prescribed herein can be expected to lead to competitive pressures which *may result in substantial modifications of grain rates in every part of the country.*"
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> * * *
>
> "Because of the widespread impact this decision is likely to have, *we recommend that the Coordinator request the Commission to withhold implementation of its order in that case until the rate dynamic underlying the transportation of grain and grain products can be more thoroughly investigated in this sub-numbered proceeding.*" (Emphasis supplied.)[13]

However, in this case the Commission regarded such disruptive consequences as irrelevant because in its view the outcome was mandated by this Court's decisions in *Mechling* and *Blue Line* (App. p. d-29).[14]

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[13]The Commission itself recently acknowledged, in its Annual Report to Congress (90th Annual Report, p. 34 (1976)), that its decision herein would "affect the entire grain rate structure" applicable to movements from the West or Midwest to Eastern destinations.

[14]If, because of changed views as to the public interest or otherwise, the Commission were to conclude that proportional rates should no longer be an integral part of the grain rate structure, the Commission could so order upon a record made in Ex Parte 270, Sub. No. 9, or another proceeding. But the effect on

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Counsel for the Commission and the United States likewise defended the Commission's order in the Court of Appeals on the ground that whatever the "possibility of disruption," the "mandate of Section 2 leaves the Commission no discretion to weigh in the balance the possible disruptive effect. . . ." (Joint Brief of United States and I.C.C., pp. 17–18.) The Court of Appeals agreed, holding that the Commission's failure "to consider the disruptive consequences of its decision on the national grain rate structure" was not error because "the Commission's decision was mandated by *Mechling* and *Blue Line*. . . ." (App. p. a-11.)

The Commission and the Court of Appeals have thus ruled that despite the rate practices of the railroad industry for decades, despite the decisions of the Commission approving and prescribing proportional rates only to through movements, despite this Court's holding in *Inland Waterways* sustaining that practice against Section 2 attack, and despite the disruptive consequences which would now occur if the railroads' practice of applying proportional rates only on through route movements were now invalidated—despite all these considerations, the railroads' practice must now be invalidated because of this Court's decision thirty years ago in *Mechling* and its subsequent *per curiam* affirmance in *Blue Line* decided on the basis of *Mechling*.

Petitioners respectfully submit that a practice so "deeply embedded" in our transportation system and so firmly supported by previous Commission and judicial decisions should *not* be cast aside, and the nation's grain rate structure should *not* be disrupted, on the theory that this Court's 1947 decision in *Mechling* mandates that result, without full review by this Court.

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the public interest was not considered, and the Commission's discretion has not been applied because, and only because, of the erroneous conclusion that this Court's 1947 decision in *Mechling* precluded any such consideration.

II.

The Court Of Appeals Erred In Construing This Court's Decision In *Mechling* As Holding That Under Section 2 Railroads Cannot Apply Proportional Rates On Through Ex-Rail Or Ex-Barge Movements Without Also Applying Those Same Proportional Rates On Non-Through Movements Of Trucked-In Grain

This Court should grant certiorari in this case because the decisions of the Commission and the Court of Appeals both misconstrued this Court's decision in *Mechling* and its related *per curiam* affirmance in *Blue Line*. Because of its erroneous view of those decisions, the Court of Appeals sustained the Commission's decision, *not* on the ground that the decision was based on an exercise of administrative expertise or discretion making a change found to be in the public interest, but on the ground that this Court's decisions "compel" the Commission's finding of unlawful discrimination under Section 2 (App. p. a-10).

In so ruling, the Court of Appeals erred. Unlike the instant case, neither *Mechling* nor *Blue Line* involved movements of trucked-in grain. Both involved movements of grain over through barge-rail routes. Thus, neither case decided the question presented here: whether it is a violation of Section 2 for the railroads to apply proportional rates to through movements but not to local movements of trucked-in grain.

Mechling arose when the barge lines, after losing in *Inland Waterways*, returned to the Commission and, along the lines suggested by this Court in *Inland Waterways*, sought the benefit of the through route status newly conferred on them by the 1940 Transportation Act.[15] In that second proceeding, the physical

[15]As stated above (*supra*, p. 10), the Transportation Act of 1940 changed the status of water carriers by imposing on the railroads an obligation "to establish reasonable through routes with common carriers by water subject to Part III" of the Act (49

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facts relating to the rail transportation outbound from Chicago were essentially identical to those in *Inland Waterways*, as well as to those involved here. Grain moved from country origins into Chicago, where it was processed or stored, and then moved out by railroad to Eastern destinations. It was recognized that, after the 1940 Act, ex-barge grain was entitled to proportional rates; and the Commission in *Mechling* was called upon to decide whether the Eastern railroads could lawfully maintain higher proportional rates on ex-barge through grain movements east from Chicago than the proportional rates applied to ex-rail movements. The Commission noted, in that second proceeding, that a record had been developed which, in the language of this Court's opinion in *Inland Waterways*, permitted prescription of " ' rates on the ex-barge traffic (from Chicago) in view of its particular circumstances and *under the provisions of the [1940] act* designed with reference thereto.' " (262 I.C.C. at 10, quoting 319 U.S. at 691 (emphasis supplied).) The Commission ruled that higher ex-barge proportionals would be lawful if they were no more than 3 cents per hundredweight higher than the proportional rates applicable on ex-rail and ex-lake through movements (262 I.C.C. 32). Mechling Barge Line then filed an action to enjoin enforcement of the Commission's orders.

This Court in *Mechling* recognized that although the physical facts had not changed following *Inland Waterways*, the law had changed with respect to barge lines. The Court pointed out that unlike *Inland Waterways* where "the last evidence was heard and the record was closed before the 1940 Transportation Act became a law. . . . The present proceedings are fully governed by the 1940 Act" (330 U.S. at 574 n.7). The Court then discussed in detail the provisions of the 1940 Act (330 U.S. at 574–77), showing that

U.S.C. §1(4)) and by imposing a similar duty on common carriers by water (49 U.S.C. §905(d)). Congress also provided that rail and water carriers would be regarded as "connecting carriers" under Section 3(4) of the Act (49 U.S.C. §3(4)).

the 1940 Act had been intended not only to authorize the Commission to regulate the barge lines, but also to change the status of the barges to that of through carriers with the railroads (*id.* at 576). Based on this analysis, the Court concluded that shippers utilizing barge-rail through rates were entitled to the same protection against discrimination as shippers over rail-rail or lake-rail through routes, and that the railroads could not charge a different proportional rate on a through barge-rail movement than on a through rail-rail or lake-rail movement (*id.* at 576–77).[16]

Court decisions subsequent to *Mechling* have applied the holding of *Mechling* in similar circumstances—where through barge-rail routes and movements were denied application of proportional rates available on through rail-rail movements.[17]

The Court of Appeals below misread *Mechling*, stating that the decision was not "limited to barges or comparisons between through rates." (App. p. a-10.) However, *nothing* in the *Mechling* decision justifies reading that decision as extending beyond barges to motor carriers or as based on comparisons with non-through rates. In that case, after its extended discussion of the special protections provided barge lines (330 U.S. at 574–77), this Court referred to Section 2, observing that "[t]he basic error of the Commission" was its apparent assumption "that the congressional prohibitions of railroad rate discriminations

[16]Indeed, the only issue in *Mechling* was *not* whether barges were entitled to through rate treatment but whether, under the 1940 Act that accorded the barges such treatment, there could be a differential in the proportional rate under Section 307(d) of the Act (49 U.S.C. §907(d)) in the absence of a cost justification, 330 U.S. at 577, 584.

[17]In *James McWilliams Blue Line, Inc.* v. *United States*, 100 F.Supp. 66 (S.D.N.Y. 1951), the court set aside a Commission order dismising a complaint attacking rates affecting transportation of rail-ocean-barge coal from mines in Virginia and neighboring locations by rail to Hampton Roads ports, thence by ocean

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against water carriers"—which was "strengthened in 1940 expressly to prevent a discrimination *against water carriers*" (330 U.S. at 577)—was "not applicable to such discriminations if accomplished by through rates" (*id.*). Moreover, both the rail-rail and barge-rail movements through Chicago were expressly stated to be "*through movements*" over "*through routes*" (330 U.S. at 570–71). Section 2 thus prohibited the railroads from applying proportional rates to one through movement (rail-rail) but not to another through movement (barge-rail). Thus, *Mechling* could not have reached or decided the further question presented in the instant case—whether different treatment of through and *non*-through movements is an unlawful discrimination.

The Court below thus erred in suggesting that *Inland Waterways* and *Mechling* were inconsistent, and that the latter somehow overruled the former (App. pp. a-10, a-11). *Inland Waterways* and *Mechling*, far from being inconsistent, were in complete harmony—the former holding that proportional rates could be applied to through movements without applying to non-through movements, and the latter holding that the same proportional rate treatment must be given to through movements by barge-rail as to through movements by rail-rail. Thus, *Mechling* was not inconsistent with, and could not have overruled, *Inland Waterways*.[18]

carrier to New England ports, and thence by barge to interior destinations. The district court's judgment was affirmed *per curiam* by this Court in *Interstate Commerce Commission* v. *James McWilliams Blue Line, Inc.*, 342 U.S. 951 (1952), on the authority of *Mechling*.

[18]Nothing in Mr. Justice Black's opinion in *Mechling* suggested that *Inland Waterways* was being overruled. Indeed, Mr. Justice Black regarded *Mechling* as the natural aftermath of *Inland Waterways*, given the changes made in the 1940 Act, and thus as entirely consistent with *Inland Waterways*. Even the dissenting opinion of Mr. Justice Jackson in *Mechling* did not suggest that

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Not only has the Court of Appeals misread *Mechling* as somehow supporting the conclusion that whether a particular movement is local or through "is beside the point" (App. p. a-10), but in so doing, it has rendered Section 216(c) of the Motor Carrier Act of 1935 (49 U.S.C. §316(c)) entirely meaningless. That section expressly provided that the creation of through truck-rail routes was permissive, but *not* mandatory.[19] This Court has recognized in a number of cases that the 1935 Act did *not* require through truck-rail routes or rates. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 72 (1945); *American Trucking*

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the majority in *Mechling* was deciding this case in a manner inconsistent with *Inland Waterways*, but rather based the dissent on the ground that the majority was misconstruing provisions of the 1940 Act. Subsequent decisions have likewise recognized the continuing vitality of the holding in *Inland Waterways*. *See, e.g., Koppers Co., Inc.* v. *United States*, 166 F.Supp. 96, 101–02 (W.D. Pa. 1958). Until this case, no subsequent decision had ever held that Section 2 prohibits the railroads from applying different rates to through movements than to local movements.

[19]Section 216(c) provides as follows:

> "Common carriers of property by motor vehicle *may* establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. . . ." (Emphasis supplied.)

The legislative history of Section 216(c) makes it clear that Congress' decision *not* to require truck-rail through routes was

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Associations v. *Atchison, T. & S. Fe Ry.*, 387 U.S. 397 (1967). Yet, under the decision below, trucks would be entitled to the benefit of the same rate treatment as through movements—and the right of railroads under Section 216(c) not to be compelled to enter into through routes with trucks would be nullified. No court has ever before held that trucks are entitled to through route or through rate treatment by railroads or that railroads violate Section 2 when they exercise their statutory right not to enter into through routes or rates with trucks. Such a result should not now be accomplished on the theory that it is mandated by a 1947 decision of this Court involving barges, and having nothing to do with trucks.

Section 216(c) stands squarely against the proposition asserted by the Court below that it "is beside the point" whether movements are through or local movements (App. p. a-10). Indeed, that proposition is contradicted not only by Section 216(c) but also by the decision in *Inland Waterways* and by almost a century of rate practice under the Act. If it were "beside the point" whether a movement is via a through or local route, then the fundamental principle that a through rate may be less than the sum of local rates over the same lines of railroad (*supra*, p. 5) would be undermined, and the rate structures applicable to virtually every commodity group in every section of the country would be jeopardized.

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deliberate: "In the original bill there was a provision for mandatory through routes and joint rates between all motor common carriers and carriers by rail, express, and water. There was substantially unanimous disapproval of this provision" (79 Cong. Rec. 5655 (1935)).

CONCLUSION

The decision below would nullify an integral part of the national grain rate structure that has been in existence since the beginning of railroad transportation. Proportional rates that are applicable solely to through movements of grain have been prescribed by the Commission and have been expressly approved by this Court. It is undisputed that invalidation of such rates will seriously disrupt the grain rate structure throughout the country. It is also undisputed that the Commission gave no consideration whatever to the consequences of such disruption because it erroneously believed that its decision was mandated by this Court's decision in *Mechling* thirty years ago—a decision which was then, and remains today, totally irrelevant to the status of trucks and truck-rail movements.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

John J. Paylor
P. O. Box 6419
2700 Terminal Tower
Cleveland, Ohio 44101

John A. Daily
1138 6 Penn Center Plaza
Philadelphia, Pa. 19104

Peter J. Hunter, Jr.
8 North Jefferson Street
Roanoke, Virginia 24042

Counsel for Eastern Railroads

Howard J. Trienens
R. Eden Martin
James W. Jandacek
One First National Plaza
Chicago, Illinois 60603

Smith R. Brittingham, Jr.
304 Cavalier Drive
Virginia Beach, Virginia 23451

Joseph D. Feeney
222 South Riverside Plaza
Chicago, Illinois 60606

Counsel for Western Railroads

June 3, 1977

ATTACHMENT A

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Chesapeake & Ohio Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago and North Western Transportation Company
Chicago South Shore and South Bend Railroad Company
Consolidated Rail Corporation
Denver & Rio Grande Western Railroad Company
William Gibbons, trustee of Chicago Rock Island and Pacific Railroad Company, debtor
Grand Trunk Western Railroad Co.
Green Bay & Western Railroad Co.
The Kansas City Southern Railway Company
Louisville and Nashville Railroad
Missouri-Kansas-Texas Railroad Co.
Missouri Pacific Railroad Company
Norfolk and Western Railway Company
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
Southern Pacific Transportation Co.
Texas & Pacific Railway Company
Union Pacific Railroad
The Western Pacific Railroad Company

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 76-1198

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, BURLINGTON NORTHERN INC., THE CHESAPEAKE & OHIO RAILWAY COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, WILLIAM GIBBONS, TRUSTEE OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR, GRAND TRUNK WESTERN RAILROAD CO., GREEN BAY & WESTERN RAILROAD CO., THE KANSAS CITY SOUTHERN RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD, MISSOURI-KANSAS-TEXAS RAILROAD CO., MISSOURI PACIFIC RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SOUTHERN PACIFIC TRANSPORTATION CO., TEXAS & PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD, THE WESTERN PACIFIC RAILROAD COMPANY,

Petitioners,

On Petition for Review of Orders of the Interstate Commerce Commission

AMERICAN BAKERS ASSOCIATION, ANHEUSER-BUSCH, INC., THE BOARD OF TRADE OF KANSAS CITY, MISSOURI,
Intervenors-Petitioners,

v.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,
Respondents,

BOARD OF TRADE OF THE CITY OF CHICAGO,
Intervenor-Respondent.

On Petition for Review of Orders of the Interstate Commerce Commission

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Submitted: December 16, 1976

Filed: February 24, 1977

Before STEPHENSON and HENLEY, Circuit Judges, and MEREDITH,* District Judge.

STEPHENSON, Circuit Judge.

Petitioners seek to review and set aside orders of the Interstate Commerce Commission (ICC) declaring certain railroad rates for the shipment of wheat eastward from Chicago to be unlawfully discriminatory and directing that the discrimination be removed.[1] The principal issue before us is whether the Commission erred in finding the rates to be discriminatory as a matter of law in violation of section 2 of the Interstate Commerce Act, 49 U.S.C. §2.[2]

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*The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri, sitting by designation.

[1]The orders were entered in proceedings styled *Board of Trade of the City of Chicago v. The Akron, Canton & Youngstown R.R. Co., et al.*, Docket No. 35825. We have jurisdiction pursuant to 28 U.S.C. §§2321(a) and 2342(5). Venue is proper in this court in that several of the petitioning railroads have their principal offices in this circuit. 28 U.S.C. §2343.

This controversy centers around the dual rate structure maintained by the petitioning railroads for the eastward reshipment of wheat originally shipped to Chicago from points west. Wheat arriving in Chicago by rail, lake steamer or barge is treated as having originated west of Chicago and is accorded a through or proportional rate for reshipment to the east.[3] Wheat arriving in Chicago by motor carrier and reshipped to the east is treated as having originated in Chicago and is charged a local rate. In 1973, the proportional rate for wheat shipped from Chicago to New York was 81.5 cents per hundredweight. The local rate for the

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[2]49 U.S.C. §2 provides:

> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

[3]A through route is an arrangement between connecting carriers for the continuous carriage of goods from an originating point on the line of one carrier to a destination on the line of another. The sum of the charges for the entire movement is the through rate. Each carrier's charge for its part of the through movement is a portion of the through rate and is often referred to as a proportional rate. *See generally Thompson v. United States*, 343 U.S. 549, 556–57 (1952); *Routing Restrictions Over Seatrain Lines, Inc.*, 296 I.C.C. 767, 772–75 (1955).

same movement was 98 cents. It is undisputed that the cost of service to the railroads for the eastward transportation of wheat from Chicago does not vary according to the manner in which the wheat was shipped to Chicago. All wheat arriving in Chicago is deposited in the same elevators and thereafter loses its identity.

In 1973, the Chicago Board of Trade filed a complaint with the ICC, alleging, *inter alia*, that the dual rate structure as it affected motor-carrier-arrived wheat at Chicago was unreasonable and discriminatory, and thus in violation of sections 1, 2 and 3(1) of the Interstate Commerce Act, 49 U.S.C. §§1, 2 and 3(1). The matter was referred to an administrative law judge, who, after hearings, found that the aforesaid rates were unjustly discriminatory in contravention of 49 U.S.C. §2.[4] The hearing examiner stated that his decision was compelled by *ICC v. Mechling*, 330 U.S. 567 (1947); and *James McWilliams Blue Line, Inc. v. United States*, 100 F. Supp. 66 (S.D.N.Y. 1951), *aff'd per curiam*, 342 U.S. 951 (1952); cases which he viewed as indistinguishable from the instant controversy. The railroads were directed to remove the unlawful discrimination.

The hearing examiner's decision was affirmed and adopted by Division 2 of the Commission. Thereafter, petitioners sought and

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[4]The hearing examiner stated his findings as follows:

> The Administrative Law Judge finds that the maintenance of the assailed proportional or reshipping rates and charges from Chicago, Ill., to points in the eastern United States, as set forth in the defendant railroads' tariffs, on wheat and wheat products, in carloads, where the prior movement of the commodities to Chicago is by railroad, lake vessel, or barge, without maintaining like rates and charges, at the same levels, and from and to the same points on the same commodities where the prior movement to Chicago is by for-hire motor carrier, is unjustly discriminatory in contravention of the provisions of section 2 of the Interstate Commerce Act; and that the assailed rates and charges are not shown to be otherwise unlawful.

were denied review by the full Commission. The Commission, however, stayed the effective date of the relief ordered pending the completion of judicial review. This petition for review, filed by the affected railroads, followed.[5]

49 U.S.C. §2 prohibits carriers from charging different rates for doing "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions . . . ."[6] Petitioners contend that wheat reshipped by rail after arriving in Chicago by rail, barge or lake steamer is a through movement,[7] whereas wheat arriving by truck and reshipped by rail is a local movement. Based on that distinction, and on the fact that the Interstate Commerce Act requires rail and water carriers to establish through routes with each other, 49 U.S.C. §§1(4) and 905, but does not require those carriers to establish through routes with motor carriers,[8] petitioners argue that the circumstances of truck-rail transportation on the one hand and rail, barge, lake-rail transportation on the other are dissimilar, and that section 2, therefore, does not require that the respective rates be the same. They argue that *Mechling* and *Blue Line* are inapposite in that those cases concerned barges and did not involve the through-local distinction presented here, and that the controlling case which mandates a finding of no discrimination is *ICC v. Inland Waterways Corp.*, 319 U.S. 671 (1943). Respondents urge that since the physical transportation of wheat eastward from Chicago and the cost thereof is the same regard-

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[5]We granted leave to intervene as petitioners to the American Bakers Association, Anheuser-Busch, Inc., and The Board of Trade of Kansas City, Missouri; and leave to intervene as a respondent to the Board of Trade of the City of Chicago.

[6]The text of 49 U.S.C. §2 is set forth at note 2, *supra*.

[7]See note 3, *supra*.

[8]Under 49 U.S.C. §316(c), establishment of such through routes is permitted but not required.

less of the mode of transportation by which it arrived, the characterization of one movement as through and the other as local is of no consequence, and that the Commission properly declared the rates to be discriminatory in accordance with *Mechling* and *Blue Line*.

We turn to an examination of the cases urged by each side as controlling.

Inland Waterways concerned the legality of railroad rates for the reshipping of grain eastward from Chicago. The railroads filed tariffs which applied proportional reshipping rates to grain arriving at Chicago by rail or lake steamer, and local rates to grain arriving by barge. In all cases, the local rates were higher than the proportional rates. After hearings on the proposed tariffs, the Commission sustained the rates, stating in part:

> Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory, and unduly prejudicial . . . and unduly preferential. . . . This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates, although in each instance the physical carriage beyond the reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forfeited its transit privileges. To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned. As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are, of course, determined by the measure of the in-bound and through rates, and properly may vary according to the relative length and nature of the inbound and through service. It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations.

319 U.S. at 681.

While the aforesaid Commission proceedings were pending, Congress enacted the Transportation Act of 1940, which, *inter alia*, conferred common carrier status on barge lines and required that they and the railroads enter into reasonable through routes with each other. 49 U.S.C. §§1(4) and 905. The barge lines sought reopening of the hearings or reconsideration on that basis, but were denied relief. Suit was then filed seeking to annul the Commission's approval of the new rates on grounds that the rates unlawfully discriminated against barges. The district court granted relief, 44 F. Supp. 368; however, the Supreme Court reversed. Mr. Justice Jackson, writing for the majority, stated in part:

> In the proceedings before the Commission the protestants pitched their case upon two propositions: (1) To deny the ex-barge grain the benefit of proportionals sought to be cancelled was necessarily unlawful since the physical carriage beyond Chicago was substantially the same, no matter where the grain originated; . . . .
>
> As the Commission corectly observed with reference to the first contention, "to adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned."
>
> Proportional rates so differing and lower than local rates for like outbound transportation have a long history, antedating the Interstate Commerce Act itself. . . .
>
> * * *
>
> To sustain the injunction would require a holding that grain originating 60 miles from Chicago must as matter of law be given the benefit of proportionals fixed with reference to grain from the Northwest Territory, embracing points in Canada and as far west in the United States as Washington and the Dakotas. In addition to the disparity in distances, there is the further fact that the grain from the Northwest is predominately wheat, while that from the territory served by the barge lines is predominately corn from Illinois. Nothing in the Interstate Commerce Act as amended by the Trans-

> portation Act of 1940, or in the statements of even the most ardent Congressional champions of water transportation, affords the slightest warrant for a decision that the Commission must treat as legally identical such widely disparate factual situations.

319 U.S. at 683–88.

The Court noted that it viewed neither the Commission's action nor its own as an approval of the then-existing rates, but rather as a determination that "the proposed schedules could not be struck down upon the erroneous view advanced by the protestants." 319 U.S. at 686. Mr. Justice Black dissented, stating that the rate structure unlawfully discriminated against barge traffic.

As noted above, the Commission, in the *Inland Waterways* proceedings, stated that while protestants' allegations could not be sustained, "in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combination." 319 U.S. at 681. Proceedings to that end ensued and formed the basis for the Supreme Court's decision in *ICC v. Mechling, supra.* The Commission concluded that the proposed rate structure which contained an 8½ cent higher rate for ex-barge grain than for ex-rail or ex-lake grain was unlawful. It further concluded, however, that reshipping rates from Chicago for ex-barge grain would be reasonable and lawful even though they were 3 cents per hundredweight higher than the comparable rates for ex-rail and ex-lake grain. Various barge lines then instituted suit, contending that the order was void in that it approved higher rates for ex-barge grain without any showing that cost of transportation to the railroads was higher for such grain than for ex-rail or ex-lake grain. The district court sustained the petitioners' allegations and enjoined the Commission's order to the extent that it permitted the 3 cent differential. On appeal, the Supreme Court affirmed, relying in

part on 49 U.S.C. §2. Mr. Justice Black, writing for the majority, stated:

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain. . . .
>
> The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that. For while Chicago is a great grain center, it cannot consume all barge-transported grain. That grain, like other grain coming to Chicago for marketing or processing, is reshipped to distant destinations.

330 U.S. at 577. Justices Frankfurter and Jackson dissented.

The third case relied on by one or the other of the parties is *James McWilliams Blue Line, Inc. v. United States, supra.* That case concerned railroad rates for the transportation of coal mined in Virginia, West Virginia and Kentucky, to Hampton Roads ports, then to New England ports, and finally to interior ports. Shippers moving coal by rail to Hampton Roads, then by ocean barge to the New England ports, and then by barge to its ultimate destination (rail-ocean-barge) were charged 45 cents per ton more for the initial rail transportation than those who used rail transportation for the third and final leg of the movement (rail-ocean-rail). All parties conceded that the railroads' cost of trans-

porting the coal to Hampton Roads in the first instance was the same in both cases. On complaint, the Commission found no unlawful discrimination. In subsequent court proceedings, however, the district court held that the disparate rate structure was discriminatory in violation of 49 U.S.C. §2, stating that the case was indistinguishable from *ICC v. Mechling, supra. See James McWilliams Blue Line, Inc. v. United States, supra,* 100 F. Supp. at 70. The Supreme Court affirmed *per curiam.* 342 U.S. 951 (1952).

Based on our reading of the statute and of the cases urged by each side as controlling, we agree with the Commission that the rates here under attack are discriminatory as a matter of law under 49 U.S.C. §2. We reject petitioners' characterization of *Mechling* and *Blue Line* as being limited to barges or comparisons between through rates. Rather, we read those cases to hold that different rates may not be charged similarly situated shippers for the same service, based on the mode of transportation used in a prior or subsequent movement, where the cost of providing the service is the same. In view of the conceded similarity in costs and circumstances in this case, *Mechling* and *Blue Line* compel a finding of discrimination under section 2. Petitioners' argument that the truck-rail transportation of grain is a local movement whereas the rail-barge, lake-rail movement is a through movement is beside the point. *Cf. ICC v. Mechling, supra,* 330 U.S. at 577.

We do not view *Inland Waterways* as being inconsistent with *Mechling* and *Blue Line.* In that case the petitioners focused more on the origin of the grain as the basis of the discrimination than on the mode of transportation into Chicago. Both the Commission and the Supreme Court stated that their holdings did not connote approval of the rates, but only that petitioners' assertions could not be sustained. In any event, to the extent that *Inland Waterways* is inconsistent with *Mechling* and *Blue Line,* we are bound

by the Supreme Court's latest pronouncements as reflected in the latter.[9]

The petition to review and set aside the orders of the Interstate Commerce Commission is denied.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[9]Petitioners additionally contend that the Commission erred in failing to consider the disruptive consequences of its decision on the national grain rate structure. In view of our holding that the Commission's decision was mandated by *Mechling* and *Blue Line,* we find no merit to this contention.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 76-1198

September Term, 1976

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. MCARTHUR; BURLINGTON NORTHERN INC., THE CHESAPEAKE & OHIO RAILWAY COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD COMPANY, DENVER RIO GRANDE WESTERN RAILROAD COMPANY, WILLIAM GIBBONS, TRUSTEE OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR, GRAND TRUNK WESTERN RAILROAD CO., GREEN BAY & WESTERN RAILROAD CO., THE KANSAS CITY SOUTHERN RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD, MISSOURI-KANSAS-TEXAS RAILROAD CO., MISSOURI PACIFIC RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, THOMAS F. PATTON AND RALPH F. TYLER, JR., ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SOUTHERN PACIFIC TRANSPORTATION CO., TEXAS & PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD, THE WESTERN PACIFIC RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION,

Petitioners,

ANHEUSER-BUSCH, INC., THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC., and AMERICAN BAKERS ASSOCIATION,

Intervenors-Petitioners,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents,

BOARD OF TRADE OF THE CITY OF CHICAGO,

Intervenor-Respondent.

On Petition for Review of Orders of the Interstate Commerce Commission

This cause came on to be heard on petition for review of orders of the Interstate Commerce Commission and briefs filed by the respective parties and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the petition to review and set aside the orders of the Interstate Commerce Commission is denied.

February 24, 1977

A true copy.

Attest:

ROBERT C. TUCKER

Clerk, U. S. Court of Appeals, 8th Circuit.
April 7, 1977

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 76-1198

September Term, 1975

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., *Petitioners,* vs. THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Respondents.*	Petition for Review of Orders of the Interstate Commerce Commission.

Petitions of petitioners and intervenor-petitioner for rehearing filed in this cause having been considered, it is now here ordered by this Court that the petitions for rehearing be, and they are hereby, denied.

March 31, 1977

APPENDIX C

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 14th day of January, 1976.

No. 35825

BOARD OF TRADE OF THE CITY OF CHICAGO

v.

THE AKRON, CANTON, & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Upon consideration of the complaint and the record in the above-entitled proceeding, including the initial decision and order of the Administrative Law Judge, the exceptions thereto filed by complainant, defendants, and by the western railroads, Peavey Company, and Archer Daniels Midland Company (intervenors), and the replies to the exceptions filed by complainant, jointly by defendants and the western railroads, intervenors, and Archer Daniels Midland Company, intervenor; and

It appearing, That the exceptions do not show any material errors in the Administrative Law Judge's statement and evaluation of the facts, his conclusions of law or findings, nor do they raise any material matters of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his initial decision, and are not of such nature as to require the issuance of a report by Division 2 discussing the evidence and arguments advanced in the light of such exceptions;

Wherefore, and good cause appearing therefor;

We find, That the evidence considered in the light of the exceptions and the replies thereto does not warrant a result different from that reached by the Administrative Law Judge, and that the statement of facts, conclusions and the findings of the Administrative Law Judge, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own.

It is ordered, That the proceeding be, and it is hereby, discontinued.

By the Commission, Division 2.

ROBERT L. OSWALD
Secretary

(SEAL)

APPENDIX D

OH

Interstate Commerce Commission

INITIAL DECISION

No. 35825

BOARD OF TRADE OF THE CITY OF CHICAGO

v.

THE AKRON, CANTON, & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Maintenance of the assailed proportional or reshipping rates from Chicago, Ill., to points in the eastern United States, as set forth in the defendant railroads' tariffs, on wheat and wheat products, in carloads, where the prior movement of the commodities to Chicago is by railroad, lake vessel, or barge without maintaining like rates and charges, at the same levels, from and to the same points on the same commodities where the prior movement to Chicago is by motor for-hire carrier, found unjustly discriminatory in contravention of the provisions of section 2 of the Interstate Commerce Act; and assailed rates and charges otherwise found not shown to be unlawful. Defendants ordered to cease and desist from the referred to violation and to publish appropriate tariffs removing such violation. Complaint in all other respects dismissed.

Harold E. Spencer and *Frank E. Polom* for complainant. *John J. Paylor* and *Richard A. Mehley* for eastern railroad defendants.

By Alvin H. Schutrumpf, Administrative Law Judge:

By complaint filed April 9, 1973, the Board of Trade of the City of Chicago alleges that the present rate structure on wheat and wheat products (as listed and defined in TL-CTR Tariff

600-I, I.C.C. C-168) covering (1) flat and proportional rates published in TL-CTR Eastern Grain Tariff C/TN 245-I, I.C.C. C-375, from Chicago to eastern basing points, viz: Albany, N. Y., Baltimore, Md., Belington, W. Va., Boston, Mass., Cumberland, Md., Hagerstown, Md., New York, N. Y., Newport News, Va., Norfolk, Va., Philadelphia, Pa., Rochester, N. Y., Rockland, Maine, Strasburg, Va., Syracuse, N. Y., Utica, N. Y., and points taking the same rates; (2) proportional rates from Chicago, Ill., as published in CTR Tariff 535-C I, I.C.C. 4495 to destinations named therein and points taking the same rates; and (3) flat rates, as published in the individual lines' tariffs of defendants to destinations covered by the last named tariff; are unlawful as hereinafter described. The railroads listed in Appendix A hereto were named as defendants.

Complainant alleges (1) that the maintenance and collection of such rates and charges were and still are unjust and unreasonable in violation of section 1 of the Act; unjustly discriminatory to wheat arriving at Chicago by rail from points beyond for further movement to the east in violation of section 2 of the Act; and unduly prejudicial to Chicago, to complainant and to its members, and to wheat and wheat products in violation of section 3(1) of the Act; and (2) that maintenance by defendants of proportional domestic rates as referred to above are unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, unjustly discriminatory to motor-carrier-arrived wheat[1] at Chicago and the shippers of such wheat and wheat products made therefrom, in violation of section 2 of said Act, and unduly prejudicial to complainant and its members, to Chicago, and to motor-carrier-arrived wheat at Chicago in violation of section 3(1) of said Act.

Complainant seeks flat rates on wheat and wheat products from Chicago to eastern basing points uniformly 6.5 cents higher than the proportional rates, with the rates on wheat products being made one-half cent higher than those on wheat,

[1] Sometimes called ex-truck wheat, ex-truck wheat products, or ex-truck traffic.

and revision of the applicable tariffs so as to permit the application of the proportionals on motor-carrier-arrived wheat and wheat products with the additional provision that the proportional rates applicable are those in effect on the dates said shipments leave Chicago.

Answers to the complainant were filed by certain defendants.

The proceeding was referred to the Judge for hearing and the issuance of an appropriate order thereon. Hearing was held at Chicago, Ill., on January 7, 8, and 9, 1974. Evidence was submitted on behalf of complainant and on behalf of certain eastern railroad defendants. Briefs were filed.

The Board of Trade of the City of Chicago (hereinafter called the Board) is a corporation created by an Act of the Illinois legislature, with its principal business in Chicago, Ill. Its 1,402 members represent all segments of the grain and grain products industries and include terminals, storage operators, grain merchandisers, cash grain merchants, processors, millers, exporters, and producers who operate and maintain facilities within the switching limits of Chicago and who ship and receive grain and grain products in interstate and foreign commerce. The Board itself ships no wheat, wheat products, or like commodities.

On March 13, 1972, complainant submitted to the Eastern Railroads a proposal (a) for an adjustment in the spread between the flat and proportional rates on grain and grain products from Chicago to eastern trunkline territory and (b) for tariff amendment to permit the application of the proportional or reshipping rates from Chicago on grain and grain products shipments reaching Chicago via motor carriers. Ultimately these requests were denied and the complainant filed the instant complaint, the relief sought being limited to wheat and wheat products rates.

The grain rate structure from Central Freight Association territory, including Illinois, to the east was established many years ago and was originally based on what is commonly-known as the McGraham Formula. Basically, the key rates are the Chicago-New York proportional and flat rates. Proportional rates are made from Chicago to other eastern basing points predicated on a percentage and/or differential over or under the Chicago-New York rate. Historically, rates from other origins in official territory were made as a percentage of the Chicago flat rates and the origin area was assigned group numbers which basically reflected the percentage of the Chicago rates. These rates were published as one-factor rates and from Illinois origins the one-factor rates generally applied to their routes through Chicago.

Paragraph (a) of Item 520 Series of TPO Maurer's Tariff C/TN 245-I, I.C.C. C-375 specifies, as follows:

> Rates apply as reshipping or proportional rates applicable on traffic reaching the re-shipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point. Rates also apply on through bill shipments not stopped in transit at re-shipping points subject to this application.

This permits the use of the proportional rates from Chicago on traffic reaching Chicago via a rail or water transportation line. Rates also apply on through bill shipments not stopping at Chicago.

One of the governing factors in the utilization of the proportional rates from Chicago is that a combination of rail rate factors to and from Chicago may not be less than the flat or local rate from Chicago to the same destination. This has been referred to as the "pad" requirement, or minimum inbound pay-in requirement. This provision is set out in subparagraph (b) of Item 520, as follows:

> Provided that in no case shall the combination through rate to and from the re-shipping point via rail be less than the rate from the re-shipping point applicable on a shipment originating thereat to final destination, the difference necessary to protect such rate from the re-shipping point to be added to the re-shipping rate therefrom.

The rules established by the Board of Trade concerning futures contracts require that all grain delivered under these contracts must protect the rail proportional rates from Chicago to points in eastern territory.

While the rail carriers parties to the proportional rate from Chicago require a pad on rail shipments to Chicago, they do not maintain a pad requirement on inbound shipments arriving via water. Thus, water-arrived grain at Chicago has the same status as rail-grain insofar as the application of the proportional rates are concerned, but inbound water-arrived grain has the advantage over rail inbound grain in that there is no pad requirement.

Appendix B hereto sets forth the flat and proportional rates at various Ex Parte increased levels, together with the corresponding pads, on wheat and wheat products from Chicago to the basing point of New York City for the period March 1938 to date. Complainant points out that on March 10, 1960, the flat rate from Chicago to New York was reduced from 73.5 cents to 67 cents (column 2) resulting in a pad of 12 cents (column 4). Similarly, the flat rate on wheat products reflected the historic one-half cent higher rate of 67.5 cents (column 5). This adjustment is said to have been the outgrowth of Docket No. 32790, Fourth Section Application No. 35140 and related proceeding and was published in supplement 150 and 151, CTRTB 245-I, I.C.C. 4403.

Appendix C hereto shows the flat and proportional rates and corresponding pads on wheat from Chicago, Ill., to eastern

trunkline basing points from March 10, 1960, to August 19, 1973. While the pads to all basing points were uniform at the Ex Parte 212, 223, and 256 levels (columns 10, 9, and 8, respectively), this uniformity was not maintained subsequent to the Ex Parte 256 increase, although apparently the carriers had sought to make appropriate adjustments, but received opposition thereto from the Board and others.

Appendix D shows similar statistics for the same period with respect to wheat products from Chicago to eastern trunkline basing points.

The flat or local rail rates from Chicago are not used to ship wheat and wheat flour traffic from Chicago to the east because they are too high in relation to the proportional rates. They do, however, establish the pad which shippers must conform to on any traffic moving beyond Chicago on the proportional rates. For example, to utilize a proportional rate of 81.5 cents cwt. (X-295-A level, 8-19-73) on wheat from Chicago to New York, inbound the wheat rail billing must have a paid-in rate of at least 16.5 cents cwt. or the deficiency must be added to the proportional rate, which accrues to the eastern carrier. In the case of wheat flour moving from Chicago on the proportional rate of 81.5 cents cwt., a rail wheat bill must have a paid-in rate of 19 cents cwt. or the deficiency made up. Complainant's representative at the hearing was unaware of any instances where deficiencies had to be made up, stating that the shippers make sure that no such situation arises.

Appendix E is a statement showing the flat and reshipping rates and pads from Chicago to eastern trunkline destinations on barley, corn, grain sorghums, and oats, published by the Eastern Railroads for application from Chicago. The pad varies from 4.5 to 7.5 cents cwt. Complainant states that this was the first major departure from the long standing eastern domestic grain rate structure. Wheat was not included in the list of whole grains on which the rates apply, nor was wheat

flour included in the list of grain products. Wheat bran and shorts, by-products of the wheat milling process, are included in the list of animal and poultry feed ingredients on which these rates apply. The re-shipping rates (application thereof published in Item 655 of TPO Maurer's Tariff E-772-G I.C.C. C-945) from Chicago are applicable on traffic which reaches Chicago via rail or water. There is no pad requirement on water-arrived grain. As indicated, the pad on rail-arrived grain varies from 4.5 to 7.5 cents, below the present pads applicable at Chicago on wheat and wheat flour. Complainant has not shown the circumstances surrounding the publication of these rates. These rates, however, are limited with respect to routing and diversion and reconsignment privileges, and are subject to reduced free time, restricted transit privileges, limited liability and higher inspection charges, which limitations generally are not applicable to the rates on wheat and wheat products as set forth in the 245-I tariff hereinbefore referred to.

Appendix F hereto sets out the level of the flat rates and the re-shipping or proportional rates sought by complainant on wheat and wheat products from Chicago to the eastern basing points. The applicable Chicago-to-New York proportional rate of 81.5 cents cwt. (X-295-A level) on wheat is used as the key rate with the rates to other basing points made as a differential over or under, or a percentage of the Chicago-New York rate. The flat or local rates are made by adding 6.5 cents to the corresponding proportional rates. To restore the historic rate relationships complainant has made the rates on wheat products one-half cent higher than those on wheat (columns 5 and 6). However, to accomplish the publication of the flat rates as suggested by complainant, carriers would require relief from Section 4 of the Interstate Commerce Act. Complainant contends that this will present no problem to the carriers since similar relief from Section 4 was obtained by the Penn Central Railroad in connection with the application of one-factor rates via Kankakee, Ill. The record establishes, however, that the

Kankakee rates and the Section 4 relief granted resulted from water competition and the desire of the carriers to recapture rail traffic lost to that water carrier, circumstances which were not shown to be present in the instant case. In the alternative, complainant states that defendants could protect the Fourth Section by maintaining the Chicago rates to eastern points, probably up to the Ohio-Indiana State line. No evidence with respect thereto was submitted.

Water-arrived shipments of wheat and wheat products at Chicago enjoy identical status with rail-arrived shipments in the application of the re-shipping or proportional rates published from Chicago in TPO Maurer's Freight Tariffs C/TN 245-I I.C.C. C-375 and CTR 535, I.C.C. 4499, except as hereinbefore indicated, water-arrived traffic does not require a pad or minimum pay-in as in the case of inbound rail shipments. Complainant's second request for relief seeks to permit the application of the proportionals on motor carrier-arrived wheat and wheat products with the provision that the proportional rates applicable be those in effect on the dates such shipments leave Chicago. This provision is identical with the applicable inbound ex-lake traffic and permits the rail carriers to implement any increase in freight rates the day the increase becomes effective, rather than revert to the date at point of origin of inbound rail and barge traffic.

Complainant refers to an example where a proportional rate applies on motor carrier-arrived grain published in Item 3385-F Supplement 77, TPO Watson's NPCT Tariff 10-P I.C.C. 1158. These rates apply on barley or wheat from specified Washington and Idaho points to specified Oregon and Washington points, but do not allow transit inspections, diversion, or reconsignment, except that shipments may be recorded at destination for transit. These rates thus are not comparable to the assailed rates and are no support for the relief sought herein.

Appendix G hereto is a statement showing wheat receipts in bushels at Chicago for the years 1963 through 1972 via rail, motor carrier, and water carrier, and the percent of the total of each mode. However, the figures shown for the years 1971 and 1972 do not include certain receipts by Dixie-Portland Flour Mills, Inc. Using figures, in pounds, as submitted by this shipper's representative and as hereinafter set forth in Appendix H, and converting pounds to bushels at the rate of 60 pounds per bushel, the rail receipts as shown in Appendix G for the years 1971 and 1972 were, respectively, 7,469,000 and 7,362,000 and the truck receipts for 1971 and 1972 were, respectively, 15,995,000 and 15,673,000. For the years 1971 and 1972, columns 2, 4, 6 and 8 would have to be revised accordingly.

At the hearing held by the rail carriers certain parties appeared and opposed the proposed tariff changes suggested by complainant unless they were granted the same treatment.

Thus, the present flat rate from Chicago exceeds the flat rate from Indianapolis to New York, whereas the proposed 88 cent flat rate from Chicago would be less than the present 90.5 cent rate from Indianapolis. Other flat rates from points located east of Chicago to the Indiana-Ohio State line are higher than 88 cents.

The present proportional rate from Chicago to New York is 81.5 cents and complainant would retain that rate. This compares, however, with the present flat rates from the central part of Ohio, including Toledo, wherein the flat rate is also 81.5 cents. As to official territory, complainant's representative knew of no point where the proportional rail rate is available at the origin point on motor carrier-arrived traffic.

Generally the drawing area of the Chicago market for wheat is northern Illinois, northern Indiana, and western Indiana on the Milwaukee Railroad to Terre Haute, as well as the former Chicago and Eastern Illinois Railroad.

Complainant states that if it is successful here that there will be more traffic available to the Eastern Railroads. It is noted, however, that on March 10, 1960, the flat rate was reduced from 73.5 cents to 67 cents and on October 4, 1960, it was increased to 68 cents and remained at that figure for almost seven years, until August 19, 1967, when it was increased to 70 cents. However, as shown in Appendix G hereto, during the period 1963 through 1970 rail receipts showed a constant decline, except 1966 exceeded 1965 and 1967 exceeded 1966. In no year after 1963 did the rail receipts equal those in 1963.

Dixie-Portland Flour Mills, Inc., is engaged in the business of milling wheat into flour. Its flour mills are located at Chicago and other points not here involved; and it has an elevator in Chicago on the Calumet River which is capable of receiving and shipping wheat by barges and lake vessels. The flour mill at Chicago is landlocked and located on the Penn Central Transportation Company's line. Its milling capacity is 9,000 cwt. per day and the rated elevator storage capacity approximates 980,000 bushels. The Calumet elevator, which was acquired in March 1971, has a rated capacity of 4.8 million bushels and it is used to supply the Chicago flour mill with wheat and to store wheat for outside companies. To supply its Chicago flour mill with wheat from the Calumet elevator, Dixie-Portland must use either rail (85 percent) or motor truck (15 percent) in cross-town service, at additional expense. The Chicago mill's annual production is about 384,000,000 pounds, of which 288,000,000 pounds consist of flour and 96,000,000 pounds consist of mill feeds.

Inbound wheat to the Chicago mill arrives by railroad or motor carrier and to the Calumet elevator by rail, truck, and water carrier. This wheat originates at country origins in Illinois and Indiana and at such major terminals as the Twin Cities, Omaha-Council Bluffs, and Kansas City, as well as country stations west thereof. Of its flour production over 90 percent is distributed in the Chicago area (approximately 150

miles of Chicago) by a motor contract carrier; some flour moves three times a week to its flour distributing plant in Memphis; and the remainder moves throughout the territory east of the Illinois-Indiana State line. Insofar as the rate-break points of New York, Boston, Philadelphia, Norfolk and Cumberland are concerned, it ships only to New York and then only for sporadic periods. In Ohio, it ships only to Toledo, five truckloads of 45,000 pounds each, every week. In addition to wheat, it ships mill feeds outbound to various eastern points including points within 150 miles of Chicago to which a substantial amount moves, Ohio points, and considerable amounts to New England points (which take the Boston rate) for use by feed producers. The Toledo traffic moves by bulk truck and that to New England points moves by rail on both proportional rates and the non-transit mileage rates in the 772 tariff hereinbefore referred to.

Appendix H hereto sets forth inbound receipts of wheat at the Chicago mill and the Calumet elevator and the outbound shipments of wheat products consisting of flour and mill feeds. These outbound shipments move to the various destinations to. which the shipper ships but the evidence does not show the amounts to specific geographical locations, other than as shown above with respect to those to which "substantial" or "considerable" amounts moved.

Of the approximate 1,500,000 bushels of soft wheat moved into Calumet storage yearly from Illinois and Indiana origins, in excess of 20 percent moves in by rail. Also about 250,000 bushels of hard wheat moves in by barge and about 750,000 bushels of spring wheat moves in (90 percent by rail and 2 percent by truck).

When the Chicago mill was acquired about ten years ago, it was for all practical purposes a 100-percent rail inbound and outbound operation. Because of numerous across-the-board increases in the gathering rates to Chicago, increases in the

outbound rates on products, and the rail carriers' inability to provide sufficient equipment and service, shipper sought other modes of transportation. When it took over the plant, it installed truck dump and bulk facilities at its flour mill and during the subsequent years the amount of truck traffic handled has increased.

Dixie-Portland's milling operation at Chicago is in competition with a General Mills' mill in Chicago and with storage facilities located in the Chicago area. Of the eight elevators in Chicago, five are located on water and they have about 80 percent of the total storage capacity. Dixie-Portland states that with respect to inbound movements of wheat its landlocked Chicago flour operation is at a distinct disadvantage with elevators located on water and that its inbound wheat movement is confined strictly to rail and motor carrier.

Elevators located on water can and do bring wheat in by barge or lake vessel in addition to rail and motor carrier; and the facilities located on water can cancel their truck billing against movements from Chicago via barge or lake vessels and utilize the inbound water or rail carrier billing for rail movements to the east in connection with proportional rates. This ability to switch the inbound billing according to the best possible advantage on outbound shipments is an advantage which a landlocked operation does not have, except in connection with inbound receipts by rail.

In view of the above, Dixie-Portland states that it would be desirable for all concerned to allow inbound motor carrier billing to be used in connection with outbound rail proportional rates; that the recognition of truck billing will simplify transit application and supervision; and that it will assist the mill to sell its products to rail-oriented customers in the east. It further states that Eastern Railroads would not suffer any loss in revenue if the flat rates are reduced to the extent requested by complainant because to its knowledge there are no movements

of wheat or wheat flour from Chicago on flat or local rates. It expects that the relief sought by complainant would result in additional wheat and wheat products traffic from Chicago to eastern destinations; but it presented no specific evidence as to where that alleged additional traffic would come from or how it would be handled by defendant rail carriers, considering that the latter appear unable to furnish all of the freight cars that the shipper desires at present. It believes that if the pad is reduced as sought to 6.5 cents cwt. it could operate thereunder by purchasing its truck wheat at harvest at 4 cents a bushel cheaper. However, during the last several years truck wheat and rail wheat have been selling at the same price and the record is not convincing that as of present if both truck wheat and rail wheat moving into Chicago could move out on rail proportional rates that truck wheat could be purchased at a lower price than rail wheat at country origins.

Continental Grain Company, of Chicago, Ill., operates two storage elevators at Chicago with a combined storage capacity in excess of 16,000,000 bushels. It engages in the buying and selling of grain, including wheat, but no wheat products. Its principal drawing market is from points in northern Indiana and northern Illinois within 150 miles of Chicago and most of such wheat is trucked into Chicago. During the year September 1, 1972 to August 31, 1973, Continental shipped 13,840,000 bushels of delivery grain from their two elevators in Chicago. In addition to this delivery function the company bought and sold many additional millions of bushels of grain that was put through the Chicago elevators. It does not show, however, the amount of this wheat which is included in the referred to figures.

Its representative at the hearing is a grain merchandiser for the company, a member of the Chicago Board of Trade Transportation and Grain Committees and a former member of the Board of Directors of the Board of Trade. He submitted considerable evidence with respect to the operations of the

futures and cash markets in the grain marketing system. He supports, on behalf of his company, the proposal to reduce the pad, as hereinbefore described, and to allow the proportional rates from Chicago to eastern points to be applicable to truck-originated traffic. He pointed out, as hereinbefore described, the advantages of having inbound wheat arriving at Chicago by rail with rail billing and the advantages of switch billing for the movement of outbound shipments of rail-arrived wheat and motor carrier-arrived wheat. He states that the effect of rate increases over the past years have made rail movement non-competitive against truck competition, especially on wheat. He admits, however, that much of the wheat moves by truck at the present, because of the lack of sufficient rail cars to perform such transportation. He expresses the view that the proposals of complainant will assist Continental and other companies in the Chicago area in obtaining wheat to move through the Chicago market to eastern points.

Generally, Continental's elevators are filled to capacity. Although it is stated that the proposal would result in additional wheat traffic for the Eastern Railroads no specific figures were submitted and otherwise such opinion is not supported by specific evidence. This traffic now is moving from other points, including such points as Toledo from which it is being transported by the Eastern Railroads and any diversion of wheat traffic to be moved through the Chicago market would be that now moving from other markets, by Eastern Railroads, and possibly other railroads.

It is pointed out that the Commodities Exchange Authority of the United States Department of Agriculture (which regulates and supervises the futures market) was instrumental in having the Chicago Board of Trade establish multiple delivery points on the wheat contract and starting with the July 19, 1973, contract, Toledo became a delivery point at 2 cents a bushel discount to the Chicago futures price. This was based on the difference in ocean or lake freight from Chicago to Toledo for

outbound water movements. No evidence was submitted, however, showing that this results in any unlawful discrimination or undue preference and prejudice within the provisions of the Interstate Commerce Act.

A cash grain merchant located at Chicago supports the proposals of the complainant, particularly the proposed application of the rail proportional rates to truck-arrived shipments. This witness solicits (a) consignments of grain from country origins and (b) offers of "to arrived" grain which he purchases and sells. In making sales of wheat to customers located east of the Illinois-Indiana State line he looks to the elevators in Chicago for stocks. Inbound billing is important to him in the movement of the wheat to the east because his customers are interested in rail transit billing, which enables them to utilize the proportional rate from Chicago to various eastern destinations. Thus, the flour mills located in the east which are customers of his depend on freight rates which permit transit arrangements. This allows the flour miller an opportunity to transit for subsequent movement of his products to destinations in the east. If the inbound movement of wheat into Chicago via motor carriers is given the same status now permitted on similar movements via rail or water in the application of the proportional rates from Chicago, this witness is of the view that it will put him in a position whereby he could increase his sales in the east because there would be more flexibility on the part of the elevator operators to offer him wheat without regard to whether the grain arrived by rail, water, or motor carrier.

As stated by the prior witnesses, most of the wheat is drawn from points in northern Illinois and northern Indiana within 150 miles of Chicago and moves in by truck. Witness states that the net returned to the farmer moving his wheat in by truck is reduced by reason of the pad. However, he admits, as have the other witnesses, that during the last several years there has been little or no differential between wheat shipped from the country origins by truck and that shipped by rail.

Nevertheless, he states that by reason of the pad, buyers at Toledo have an advantage over Chicago buyers, because of the unavailability of proportional rates on truck-arrived traffic at Chicago and the fact that the flat rate from Toledo is the same as the proportional rate from Chicago to New York. He further states that by reason thereof the mills and elevators east of Chicago, particularly in Toledo and environs, are able to reach into northeastern Indiana to points equi-distant between Chicago and Toledo, bid for wheat in competition with the Chicago buyers, and move their flour and wheat out from Toledo either by truck or on the 81.5 cents flat rail rate. The same situation is said to exist from numerous other points such as Columbus, Cincinnati, and Fostoria, Ohio, Hillsdale, Mich., and Ligonier, Ind.

This witness is almost entirely a rail operator, but does purchase some truck wheat in northern Indiana. He has experienced difficulty in purchasing rail-originated wheat and is of the view that if rail proportionals out of Chicago were made applicable to truck-arrived wheat, he would be more competitive with respect to the drawing of wheat from points equidistant from Toledo. Further, he is of the opinion that the relief sought would not result in any loss of traffic to the Eastern Railroads, and states that such relief would place the Eastern Railroads in a position to attract more rail traffic. He acknowledges, however, that the Eastern Railroads have had difficulty in furnishing a sufficient number of cars for eastbound traffic; that any alleged benefit from the proposal herein would be contingent upon the Eastern Railroads having additional equipment available; and that any such traffic as they might attract would be traffic which now moves from other markets.

No evidence was submitted by this witness showing the extent of his present operations and the extent to which there would be an increase in wheat handled by him if the relief sought is granted.

Defendants point out that the provision in Item 520 of the 245 tariff that the re-shipping or proportional rates apply only on traffic reaching the re-shipping point via rail or water applies not only to Chicago but to its competing points in Illinois and neighboring States. Thus, East St. Louis and Kankakee, Ill., St. Louis, Mo., and Milwaukee, Wis., among others, for example, are similarly subject to this restriction on the application of the proportional rate. The rates from Chicago are slightly lower in comparison to those applicable from other Illinois points. Various other origin points such as Milwaukee and Manitowoc, Wis., take the same flat and proportional rates as Chicago. Peoria and Decatur (from other than northwest origins), East St. Louis, and Cairo, Ill., St. Louis, Mo., as well as other Illinois points, have flat and proportional rates higher than Chicago. Appendix I hereto sets forth rates from Chicago and competitive points to New York. When traffic originates at a western territory point, such as Kansas City, Mo.-Kans. the combination rates to and from Chicago to eastern destinations is equalized over the other gateways (except that Peoria is one-half cent higher).

Appendix J shows the annual volume of wheat shipments from Chicago by various modes of transportation during the years 1962 through 1971; and according to 1971 Board of Trade statistics, wheat was shipped during that year via lake vessel, rail, and truck, in the following amounts:

Lake vessel—	2,954,000 bushels (domestic and export)
Rail	3,462,000 bushels
Truck	26,000 bushels

Appendix K shows the volume of wheat and flour handled eastbound from Chicago by railroads during the six-year period 1958 through 1966 when the pad was 18.5 cents until March 1960 and thereafter from 12 to 13 cents, showing a decline in traffic handled every year, except in 1965 with respect to wheat and in 1960 and 1961 with respect to flour.

At the hearing Eastern Railroads contended that Chicago is not prejudiced by the present rate structure, pointing to the rates hereinafter set forth from other origins. They state that if the relief sought is granted it could not be limited to wheat and wheat products or to the movement of these commodities only from Chicago and its environs, but would require a realignment of the entire grain rate structure so as to include other grains and grain products and require reductions from other origins, the rates from which are related to the Chicago rates. Evidence was presented showing that when complainant sought from the railroads relief with respect to grain and grain products, similar to that sought herein various shippers stated that any adjustment made in the rates from Chicago to eastern destinations would require a related adjustment from origins east of Chicago and that in some instances shippers located west of Chicago also objected to any change in the rate relationship. Thus, at the hearing held by the railroads, General Foods appeared in favor, provided that their plant at Kankakee received a similar reduction with respect to corn and corn products. Also, Pillsbury appeared in support of the similar proposal concerning the application of the proportional rates to motor carrier-arrived grain and grain products but suggested that St. Louis and Minneapolis-St. Paul be accorded equal adjustment. The only shipper which supported the proposal without qualification concerning the addition or extension of the adjustment to other origins was Continental Grain Company. The Eastern Railroads also pointed out that it is doubtful that the reduction sought on wheat and wheat products would result in any additional traffic because a substantial amount of such traffic is now moving by eastern lines, as hereinbefore shown. The 26,000 bushels figure for truck wheat amounts to approximately 13 carloads; and the 1,340,000 bushels of lake vessel traffic which moves primarily to Buffalo would not, in the railroad's opinion, be divertable to their lines. Further, in 1971 a substantial portion of the wheat shipments and all of the flour shipments moved via rail. With respect to the facts concerning

Toledo and contentions with respect thereto, Eastern Railroads point out that if the proportional rates are made applicable on motor carrier-arrived wheat at Chicago the rails would then be required to charge the proportional rate of 81.5 cents to New York which is the same as the flat rate from Toledo, thus transporting the traffic the extra 233 miles (from Chicago to Toledo) for no additional charge. This, of course, deprives Toledo of its natural advantage of being 233 miles closer to the market.

Defendant The Baltimore & Ohio Railroad Company (B&O) submitted an estimate of the approximate amount of revenue reduction which it considers it would suffer if the Board of Trade is successful in obtaining the relief sought herein. B&O points out that complainant seeks a 10 cents reduction in the Chicago-New York flat rate, from 98 cents to 88 cents or approximately 10 percent. It concludes that, because of the relationship between the flat rate from Chicago and flat rates from St. Louis, Mo., points in Illinois, and points east of Illinois to eastern destinations, a 10 percent reduction in the rates on all wheat and wheat products traffic would ultimately be required and that this would result in $97,478 reduction in B&O revenue on this traffic. It further states that if complainant is successful in making the eastbound proportional rates applicable on truck-arrived traffic, other official territory origins will demand similar relief, resulting in additional revenue losses of $68,235, for a loss of $165,713. Set forth as Appendix L hereto are figures showing the pertinent traffic transported by The B&O during 1972 and the revenue therefrom, including a grand total revenue of $974,780.

B&O is of the opinion that its estimate of losses set forth above is conservative. In any event, it is of the view that even if the same reduction in cents or a comparable percentage reduction is not made with respect to all rates from origins east of Chicago that some adjustments would have to be made in

order to clear the requirements of section 4 of the Interstate Commerce Act. It bases this view on the opinion that the Commission would not allow fourth section relief.

Penn Central Transportation Company (Penn Central) submitted evidence similar to that submitted by the B&O. Based on traffic statistics and revenues received by it in 1972 in connection with the traffic involved in the instant proceeding, it concludes that if a 10 percent reduction in the Chicago-New York flat rate (from 98 cents to 88 cents) is granted Penn Central could suffer a 10 percent reduction ($1,037,380) in revenue, as shown in Appendix M hereto. It further states that if complainant is successful in having the Chicago-New York proportional rate made available on wheat trucked to Chicago, this would, for all practical purposes, make the Chicago-New York proportional rate the flat rate. And, all other official territory origin points would insist that their rate relationship with Chicago be maintained on all ex-truck traffic. It contends that if this were done it would result in approximately a 17 percent reduction in the rates from and to the above referred to points and Penn Central would experience an additional $726,273 reduction in its revenues, for a total revenue loss of $1,763,557. These revenue figures deal only with wheat and certain wheat products. However, if the Eastern Railroads were made to apply the sought reductions to other grains and grain products (as initially sought by complainant in proposals to the Eastern Railroads as hereinbefore referred to), the reduction in Penn Central's revenue would be much greater. Further, it points out that Fourth Section relief would be required; and it questions whether such relief would be granted by the Commission. It has made no estimate of the amount of revenue it would expect to lose if rates at intermediate points would be reduced to the level of the sought Chicago flat rate.

Appendix N hereto sets forth the tonnage of wheat and wheat products originated in 1972 at principal points in the

States named and the figures therein set forth are included in Appendix M. These statistics were submitted at the request of complainant.

Norfolk & Western Railway Company (N&W) submitted evidence similar to that submitted by the other two railroad defendants. Thus, as shown in Appendix O hereto, during 1972, N&W handled 6,261 cars of wheat and wheat products from points in the listed States to the referred to destination territory. These cars moved 227,434 tons producing $1,521,779 in revenue for N&W. The respective 10 percent loss and the loss from the 17 percent reductions referred to in connection with the prior railroads result in estimated losses of $255,490 and $178,844, for a total revenue loss of $434,334. Its contentions were similar to those of the B&O and Penn Central. As in the case of the other railroads, no calculations were made as to what the projected effect would be on the N&W if the Chicago flat rate were reduced to 88 cents and that was held at a minimum at intermediate points.

DISCUSSION AND CONCLUSIONS

Complainant and its witnesses contend that the total relief sought would make more traffic available to the Eastern Railroads and thus be beneficial to them. Suffice it to say that complainant's evidence is too indefinite and conjectural to support such a conclusion and, further, that defendants' evidence shows, at least, that reducing the flat rate would not result in additional revenue. In any event, the question to be resolved here is whether any of the complained of rates and tariff provisions violate sections 1, 2, and 3 of the Interstate Commerce Act, as alleged. The discussion hereafter will be divided into two parts, count (1), that relating to the alleged unlawfulness of the proportional and flat rates and the resulting

pads, and, count (2), that relating to the alleged unlawfulness of the tariff provision which precludes on the outbound movement from Chicago of motor carrier-arrived wheat the application of the proportional rates now applicable to rail-arrived and water-arrived wheat.

(1) In this count complainant alleges that the local and joint flat and proportional domestic rates and charges on wheat and wheat products from Chicago to various eastern basing points and other destinations in the east are unjust and unreasonable in violation of section 1 of the Act, unjustly discriminatory to wheat arriving at Chicago by rail from points beyond for further movement to the east in violation of section 2, and unduly prejudicial to Chicago, to complainant and its members, and to wheat and wheat products in violation of section 3(1) of the Act. It seeks to have the flat rates reduced so that the pad would be uniformly 6.5 cents. See Appendix F hereto.

Complainant points to the history of the flat and proportional rates as shown in Appendix B hereto and states that the evidence discloses no possible basis on which the present pads can be justified. The burden of proof, however, is upon complainant to show the unlawfulness of the rates resulting in the pads. Mere allegations of unlawfulness are not sufficient.

As indicated, in this count complainant asks only that the flat rate be reduced. It presented no cost evidence or other cost-related evidence showing that the flat rates are excessive and thus unreasonable. It refers to the mileage rates which are published in the CTR 772 series tariffs, I.C.C. C-945, which apply on barley, corn, grain sorghums, soybeans, and oats, pointing out that the pads with respect to the rates on these commodities range from 4.5 to 7.5 cents. See Appendix E. These latter rates deal with commodities different from those here in issue (being used principally for animal and poultry feeds) and are, as hereinbefore set forth, subject to various restrictions or limitations (to which the challenged rates are not

subject) which preclude their consideration in determining the reasonableness of the assailed flat rates. The fact that the flat rates are higher than the proportionals, in excess of 6.5 cents, does not without further proof establish that they are unreasonable. The progressive increases in flat rates and pads resulted from Ex Parte increases found by the Commission to be lawful.

The record establishes that no traffic moves from Chicago under the assailed flat rates, but the record does not establish that the flat rates have inhibited the movement of the involved traffic out of Chicago. Further, the record contains no convincing evidence that the sought reductions would result in movements thereunder. A statement by one of complainant's supporting witnesses that he probably could purchase truck-originated wheat at country origins at a sufficient discount to warrant the use of the flat rates is no more than conjecture and flies in the face of recent facts which show that due to the demands for wheat and the shortage of freight cars to haul it, truck-originated wheat has been selling at country origins at or near the prices of rail-originated wheat. The changes in the flat rates and pads sought by complainant are not to correct a transportation condition, but rather a market condition so as to enable its members to more readily buy and sell wheat and wheat products without being unduly inhibited by the Board of Trade rule which requires the seller to protect the pad on wheat and wheat products moving out of Chicago.

The Judge concludes that complainant has failed to show that the assailed rates and the resulting pads are unreasonable in violation of section 1 of the Act.

(b) Although under this count, complainant alleges violation of section 2, in its brief it sets forth no specific contentions concerning the alleged discrimination of the flat rates *per se* and resulting pads, relying instead on the justification therefor under its contentions relating to count 2.

Motor carrier-arrived wheat is not entitled to the proportional rates and, therefore, there is no pad which could differ from that applicable to rail-arrived wheat and thus resulting in discrimination to rail-arrived wheat. The flat rates are equally applicable to all wheat moving to, through, and from Chicago. Further, even if the proportionals are made applicable to motor-arrived wheat there would be no discrimination because they would be applicable to all common carrier-arrived wheat. At present, the pad is required in connection with rail-arrived wheat in order to avoid violations of section 4 of the Interstate Commerce Act. No such problem exists with respect to motor carrier-arrived wheat. Further, as hereinbefore set forth, the rates provided in Tariff E-772 on coarse grains, etc., used as feed ingredients, do not cover like traffic as that here involved and, as indicated above, are subject to differing restrictions and conditions so that they do not cover "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" as provided in section 2.

The Judge concludes that under this count complainant has failed to establish that the assailed rates and the resulting pads are discriminatory in violation of section 2 of the Act.

Whether the proportionals are discriminatory or unduly preferential because they are not applicable to motor carrier-arrived wheat will be discussed hereinafter under count 2.

(c) As in the case of allegations of section 2 violations discussed above, complainant in its brief does not under this count submit arguments as to alleged section 3(1) violations. The evidence does not establish that the assailed rates prejudice complainant (which ships no traffic) and its members, Chicago, or wheat and wheat products in violation of section 3(1), as alleged. Insofar as rates on wheat and wheat products from other shipping points are concerned, the evidence shows that the flat and proportional rates from those origins are the same

as or higher than the rates from Chicago, and also, that the pads applicable from those points on comparable rates are equal to or higher than the Chicago pads. See Appendix I hereto.

Toledo, also a competitor of Chicago, has available for shipments into the east a flat rate equal to the Chicago proportional, although Toledo is located 233 miles closer to eastern markets than is Chicago. Further, the Tariff E-772 rates afford no basis for a conclusion of preference and prejudice for the reasons hereinbefore set forth.

The Judge concludes that complainant has failed to establish any violation of the provisions of section 3(1) of the Act.

2. In this count, complainant alleges that the proportional rates on wheat and wheat products from Chicago to the east are unjust and unreasonable in violation of section 1 of the Act; unjustly discriminatory to motor-carrier-arrived wheat at Chicago and the shippers of such wheat and wheat products made therefrom, in violation of section 2; and unduly prejudicial to complainant and its members, to Chicago, and to motor-carrier-arrived wheat in Chicago in violation of section 3(1).

The Chicago proportional rates are restricted against application upon wheat which arrives at Chicago by motor carrier. They are, however, applicable on wheat which arrives at Chicago by rail or by water, and the products thereof. Wheat does arrive at Chicago by motor carrier and the volume of such motor-carrier-arrived wheat has been substantially increasing in recent years both as a result of disparities between the rail and the motor carrier rates and as a result of the inability of the rail carriers to furnish equipment to move wheat to the market.

Up to 1939, the proportional or reshipping rates from Chicago to the east applied equally on grain arriving at Chicago ex-rail, ex-lake, or ex-barge. Because of the vast increase in barge tonnage from competitive points subsequent to 1933, the

rail carriers proposed to restrict the proportional or reshipping rates against ex-barge traffic in order to recapture some of the traffic lost to the barges. The Commission originally held that this could be done, but indicated that in a proper proceeding it might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations. *Grain Proportionals, Ex-Barge to Official Territory,* 248 I.C.C. 307 (1941).

Subsequently, in a report on further hearing in *Grain Proportionals, Ex-Barge To Official Territory,* 262 I.C.C. 7, the Commission concluded, in part, that ex-barge grain rates east from Chicago would be reasonable and lawful even though they were 3 cents per hundred pounds higher than rates for ex-rail and ex-lake grain. Thus, in effect, the Commission permitted the railroads to charge higher reshipment rates for ex-barge than for ex-lake and ex-rail grain.

The last cited decision was appealed to the Courts and ultimately resulted in the decision of the Supreme Court of the United States in *I.C.C. v. Mechling,* 330 U.S. 567 (1947). In that case, after referring to various provisions in part III of the Act, as well as section 3(4), the Supreme Court continued (pp. 576-577):

> Finally § 2 of the pre-existing Act has long forbidden the Commission to authorize railroads to charge one person more than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions . . ." [February 4, 1887] 24 Stat 379, 380, c 104, 49 USCA § 2, 10A FCA title 49, § 2.
>
> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. **Concretely, the provisions mean**

> **in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain.** (Emphasis added.)

The barge carriers involved in the *Mechling* case were certificated carriers under part III of the Act, but the grain traffic they handled was not necessarily subject to regulation and much of it in fact was not handled on regulated rates. Furthermore, as indicated, the eastern rail carriers had always permitted lake-arrived grain to move out on the Chicago proportional rates without penalty.

As a result of the decision in the *Mechling* case, the Eastern Railroads amended their tariffs to provide that the Chicago proportional rates would be applicable on grain which arrived at Chicago ex-barge.

The matter of restricting rail proportional rates against application on coal traffic having a subsequent movement by barge wholly on unregulated rates came before the Commission in *James McWilliams Blue Line v. Campbell's Creek R. Co.,* 278 I.C.C. 312 (1950). Again the Commission held that such a restriction was lawful. It stated at page 319:

> Complainant Blue Line cites *Interstate Commerce Commission v. Mechling,* 330 U.S. 567, in which the Court permanently enjoined our order authorizing a 3-cent increase in certain ex-barge proportional rates on grain, without corresponding increases in certain proportional rates or specifics on ex-rail and ex-lake grain, the three sets of rates having been theretofore on a parity. The circumstances in that case are fully set forth in the Court's decision and in our report in *Grain Proportionals, Ex-Barge to Official Territory,* 262 I.C.C. 7. They differed in many essential respects from those presented here. **Most**

of the barge transportation of the grain was subject to our jurisdiction and it was impracticable to distinguish from a rate-making standpoint between that which was subject to our jurisdiction and that which was not. The lake transportation of the grain, like the coal transportation by water in the instant proceedings was not subject to our jurisdiction. Increasing the ex-barge rates on grain without corresponding increases in the ex-lake rates on grain would have resulted in more favorable treatment of the unregulated lake transportation than of the regulated barge transportation. (Emphasis added.)

Suit was then filed by James McWilliams Blue Line in the United States District Court for the Southern District of New York to set aside and enjoin the Commission's order. The court granted the relief sought. In its opinion in *James McWilliams Blue Line v. United States,* 100 F. Supp. 66 (1951), it said, at page 70:

> . . . we hold that the rates complained of are unlawful because in violation of Section 2 of the Interstate Commerce Act, 49 U.S.C.A. § 2. We find it unnecessary, therefore, to determine the legality of these rates under Sections 3(1) and 3(4) of the Act.

We are unable to distinguish the instant case from *I.C.C. v. Mechling,* 1946, 330 U.S. 567, 67 S.Ct. 894, 91 L.Ed. 1102. There the order of the Commission permitted the railroads to charge higher reshipment rates (3 cents per 100 lbs.) east from Chicago for grain brought to Chicago by barge than for ex-lake or ex-rail grain. The enforcement of the order was enjoined to the extent that it permitted this extra charge.

> . . . It has been settled with respect to the provisions of Section 2 of the Act prohibiting different charges by a common carrier for "a like and contemporaneous service in

> the transportation of a like kind of traffic under substantially similar circumstances and conditions" that "***the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated."

* * *

> *Nor are we impressed by the attempt of the Commission to distinguish this case from the Mechling case because the Commission cannot regulate "Blue Line's" barge rates.* That was true, at least as to part of the ex-barge grain in the Mechling case; however, as we read the Mechling case, the decision was not based upon the existence of jurisdiction in the Commission to regulate the barge rates on the grain traffic and was reached quite independently of such jurisdiction. (Emphasis added.)

In granting the relief sought, the court directed the Commission "to make and enter an appropriate order ending the practice complained of and enjoining the Commission from further continuing and enforcing the practices and rates now in effect". The court's judgment was affirmed *per curiam* by the Supreme Court. *Interstate Commerce Commission v. James McWilliams Blue Line, Inc.,* 342 U.S. 951 (1952). See also, *Chicago, Rock Island & Pacific R. Co. v. United States,* 233 F. Supp. 381, 386 (E.D. Mo., 1964).

The present situation cannot be distinguished from the *Blue Line* and *Mechling* cases. A large amount of wheat arrives at Chicago by motor carrier as well as by rail and water, but, whereas inbound billing on the ex-rail, ex-lake, and ex-barge wheat can be used to engage the Chicago proportional rates to the east, this is not true with respect to ex-truck billing. All wheat, whether ex-rail, ex-lake, ex-barge, or ex-truck goes into the same elevators. When it does so, it loses its identity insofar

as its mode of transportation is concerned. With respect to all wheat of the same type, there is no way to distinguish whether it arrived at the elevator by rail, water, or truck.

The issue here is not a matter of the physical transportation of the wheat and products but of the application of the inbound billing. When wheat comes out of the elevator or when wheat products are shipped from a mill, in most cases, neither the shipper nor the railroad knows how that particular wheat arrived at the elevator, nor does it make any difference to them. It makes no difference in the operation of the railroad whether the wheat arrived by rail, water, or truck.

Furthermore, switching billing is common and is permitted by the rail tariffs. In such a case, wheat which, because of its type, can be identified as having moved to the mill or elevator by truck, can be shipped out on the proportional rates and inbound rail or water billing can quite properly be applied so as to engage the proportional rates.

In any case, it makes no difference to the Eastern Railroads how the wheat arrived at the elevator or mill. Their service is exactly the same on the Chicago-to-the-east move whether the wheat arrived at the mill or elevator by rail, water or truck and thus the costs are the same.

Although no wheat or products thereof have moved on the flat rates to eastern points and shippers have, by various means moved their traffic out of Chicago, (including the shipment of motor-carrier-arrived wheat under rail proportional rates by switch-billing), they have shown that the complained of restriction has inhibited and damaged them in the conduct of their businesses of buying and selling wheat and wheat products and in the shipping thereof.

The Judge concludes that the Eastern Railroads' restriction against permitting the Chicago proportional rates to the east to apply on motor-carrier-arrived wheat at Chicago is an unjust

discrimination against such wheat and the shippers thereof in violation of section 2 of the Act, and that such restriction should be removed from the tariffs of the Eastern Railroads. In view of the above conclusion no further consideration will be given to the alleged violations of sections 1 and 3(1) of the Act.

The decision herein is not a major Federal Action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

FINDINGS AND ORDER

The Administrative Law Judge finds that the maintenance of the assailed proportional or reshipping rates and charges from Chicago, Ill., to points in the eastern United States, as set forth in the defendant railroads' tariffs, on wheat and wheat products, in carloads, where the prior movement of the commodities to Chicago is by railroad, lake vessel, or barge, without maintaining like rates and charges, at the same levels, and from and to the same points on the same commodities where the prior movement to Chicago is by for-hire motor carrier, is unjustly discriminatory in contravention of the provisions of section 2 of the Interstate Commerce Act; and that the assailed rates and charges are not shown to be otherwise unlawful.

The Judge further finds that this decision is not a major Federal Action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is the ORDER of the Administrative Law Judge that the defendant railroads be, and they are hereby, notified and required to cease and desist within 60 days of the date this order becomes effective and thereafter to abstain from the application of the rates and charges herein found unlawful; that the defendants be, and they are hereby notified and required to

establish within 60 days of the date this order becomes effective, upon not less than 30-days' notice to this Commission and to the general public, by filing and posting in the manner prescribed in the Interstate Commerce Act, and thereafter to maintain and apply, rates and charges removing the unlawful discrimination herein found to exist; and that this order shall continue in force until the further order of the Commission.

It is further ordered, That the complaint in all other respects be, and it is hereby, dismissed.

And it is further ordered, That in the absence of a stay or postponement by the Commission, or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof.

Dated at Washington, D.C. this 18th day of April, 1974.

By the Commission, (Alvin H. Schutrumpf), Administrative Law Judge.

ROBERT L. OSWALD,
Secretary.

(SEAL)

No. 35825

Appendix A

List of Defendants

Group I

Baltimore and Ohio Railroad Company, The.
Chesapeake and Ohio Railway Company, The, Chesapeake District.
Chesapeake and Ohio Railway Company, The, Pere Marquette District.
Chicago & Eastern Illinois Railroad Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
Chicago South Shore and South Bend Railroad.
Erie Lackawanna Railway Company, Thomas F. Patton and Ralph S. Tyler, Jr., Trustees.
Grand Trunk Western Railroad Company.
Louisville and Nashville Railroad Company.
Norfolk and Western Railway Company.
Penn Central Transportation Company, George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees.

Group II

Akron, Canton & Youngstown Railroad Company, The.
Ann Arbor Railroad Company, The.
Arcade and Attica Railroad Corporation.
Aroostock Valley Railroad Company.
Baltimore and Annapolis Railroad Company, The.
Baltimore and Eastern Railroad Company.
Baltimore and Ohio Chicago Terminal Railroad Company, The.
Bangor and Aroostock Railroad Company.
Bath and Hammondsport Railroad Company.

Belfast and Moosehead Lake Railroad Company.
Bellefonte Central Railroad Company.
Belt Railway Company of Chicago, The.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Corporation, Robert W. Meserve, Trustee.
Boyne City Railroad Company.
Brooklyn Eastern District Terminal.
Burlington Northern Inc.
Cambria and Indiana Railroad Company.
Canadian National Railways Lines Thunder Bay, ON., Armstrong, ON., and East thereof.
Carolina, Clinchfield and Ohio Railway; Carolina, Clinchfield and Ohio Railway of South Carolina, Lessees: Seaboard Coast Line Railroad Company; Louisville and Nashville Railroad Company.
Carolina and Northwestern Railway Company.
Central Indiana Railway Company.
Central Railroad Company of New Jersey, The, Robert D. Timpany, Trustee.
Central Vermont Railway, Inc.
Chesapeake Western Railway.
Chestnut Ridge Railway Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Transportation Company.
Chicago River and Indiana Railroad Company, The.
Chicago, Rock Island and Pacific Railroad Company.
Cincinnati, New Orleans and Texas Pacific Railway Company, The.
Claremont and Concord Railway Company, Inc.
Clarendon and Pittsford Railroad Company, The.
Cooperstown and Charlotte Valley Railway Corporation.
Coudersport and Port Allegany Railroad Company.
CP Rail (Canadian Pacific Limited) Lines Thunder Bay, ON., and East thereof.
Dansville and Mount Morris Railroad Company, The.
Delaware and Hudson Railway Company.

Detroit and Mackinac Railway Company.
Detroit, Toledo and Ironton Railroad Company.
Detroit and Toledo Shore Line Railroad Company, The.
East Jersey Railroad and Terminal Company.
East Washington Railway Company.
Elgin, Joliet and Eastern Railway Company.
Fonda, Johnstown and Gloversville Railroad Company.
Fore River Railroad Corporation.
Frankfort & Cincinnati Railroad Company.
Genesee and Wyoming Railroad Company.
Georgia Rail Road & Banking Company, operated as the Georgia Railroad by
Lessees:
Louisville and Nashville Railroad Company
Seaboard Coast Line Railroad Company.
Grafton and Upton Railroad Company.
Grand Trunk Railway System
Green Mountain Railroad Corporation
Greenwich & Johnsonville Railway Company.
Hoboken Shore Railroad.
Pittsburgh and Lake Erie Railroad Company, The.
Pittsburgh & Shawmut Railroad Company, The.
Port Huron and Detroit Railroad Company.
Quebec Central Railway Company.
Rahway Valley Railroad (Rahway Valley Company, Lessee).
Raritan River Rail Road Company.
Reading Company, Richardson Dilworth and Andrew L. Lewis, Jr., Trustees.
Richmond, Fredericksburg and Potomac Railroad Company.
Rosslyn Connecting Railroad Company.
St. Johnsbury & Lamoille County Railroad.
St. Louis Southwestern Railway Company.
Seaboard Coast Line Railroad Company.
Seaport Navigation Company.
Skaneateles Short Line Railroad Corporation.
Soo Line Railroad Company.

South Brooklyn Railway Company.
Southern Railway Company.
Springfield Terminal Railway Company (Vermont).
Staten Island Railroad Corporation, The.
Stewartstown Railroad Company, The.
Terminal Railroad Association of St. Louis.
Toledo, Peoria & Western Railroad Company.
Toronto, Hamilton and Buffalo Railway Company, The.
Trenton-Princeton Traction Company. (RDG)
Twin Branch Railroad Company.
Vermont Railway, Inc.
Virginia Central Railway.
Warwick Railway Company.
Wellsville, Addison & Galeton Railroad Corporation.
Western Maryland Railway Company.
West Virginia Northern Railroad Company.
Wharton and Northern Railroad Company.
Winchester and Western Railroad Company.
Winfield Railroad Company, The.
Yancey Railroad Company.
Youngstown & Southern Railway Company.
Illinois Central Gulf Railroad Company.
Illinois Northern Railway.
Illinois Terminal Railroad Company.
Indiana Harbor Belt Railroad Company.
Ironton Railroad Company, The (Lehigh Valley Railroad Company and Reading Company, Lessees).
Lackawanna & Wyoming Valley Railway Company.
Lake Erie, Franklin & Clarion Railroad Company.
Lehigh and Hudson River Railway Company, The, John Trioano, Trustee.
Lehigh and New England Railway Company.
Lehigh Valley Railroad Company, John F. Nash and Robert C. Haldeman, Trustees.
Livonia, Avon & Lakeville Railroad Corporation.
Long Island Rail Road Company, The.

Lorain & West Virginia Railway Company, The.
Louisville and Nashville Railroad Company.
Louisville, New Albany & Corydon Railroad Company.
Lowville and Beaver River Railroad Company, The.
Maine Central Railroad Company.
Manufacturers Railway Company.
Maryland and Pennsylvania Railroad Company.
Middletown and New Jersey Railway Company, Inc.
Midway Railroad Company.
Missouri-Illinois Railroad Company.
Missouri-Pacific Railroad Company.
Montour Railroad Company.
Montpelier and Barre Railroad Company.
Morristown & Erie Railroad Company.
Moshassuck Valley Railroad Company.
Narragansett Pier Railroad Company, Inc., The.
New Jersey, Indiana & Illinois Railroad Company.
New York Dock Railway.
New York and Long Branch Railroad Company, The.
New York, Susquehanna and Western Railroad Company.
Norfolk, Franklin and Danville Railway Company.
Norfolk Southern Railway Company.
Northampton and Bath Railroad Company.
Norwood & St. Lawrence Railroad Company.
Ogdensburgh Bridge and Port Authority.
Paducah & Illinois Railroad Company.
Pennsylvania and Atlantic Railroad Company (The Union Transportation Company, Lessee).
Pennsylvania-Reading Seashore Lines
Peoria and Pekin Union Railway Company.
Peoria Terminal Company.

No. 35825

Appendix B

Statement of Flat and Proportional Rates from Chicago, Ill., to New York (Domestic) with Applicable "Pad" from March 1938, to Date (X-295-A)

Date	Wheat			Wheat Products			
	Flat	Prop	Pad	Flat	Prop	Pad	Rate Level
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Mar. 28, 1938	34.5	26	8.5	35	26.5	8.5	X-123, ICC 30
Jan. 21, 1947	40	30	10	40.5	30.5	10	X-162, ICC 771
Jan. 8, 1948	50	37.5	12.5	50.5	38	12.5	X-166, ICC 784
Sept. 26, 1949	55.5	41.5	14	56	42	14	X-168, ICC 811
Apr. 5, 1956	62	46.5	15.5	62.5	47	15.5	X-175, ICC A-1076
Jul. 10, 1956	65.5	49	16.5	66	49.5	16.5	X-196, ICC A-1095
May 10, 1957	69	51.5	17.5	69.5	52	17.5	X-206, ICC A-1122
Oct. 18, 1957	71.5	53.5	18	72	54	18	X-206-A, ICC A-113
Jun. 1, 1958	73.5	55	18.5	74	55.5	18.5	X-212, ICC A-1113
Mar. 10, 1960	67	55	12	67.5	55.5	12	X-212
Oct. 24, 1960	68	55.5	12.5	68.5	56	12.5	X-223, ICC 151
Aug. 19, 1967	70	57.5	12.5	70.5	58	12.5	X-256, ICC 281
Nov. 28, 1968	74	61	13	75	61	14	X-259-B, ICC 302
Nov. 18, 1969	78	65	13	80	65	15	X-262, ICC 312
Nov. 20, 1970	83	69	14	85	69	16	X-265-B, ICC 336
Apr. 12, 1971	92	76.5	15.5	94.5	76.5	18	X-267-B, ICC 343
Oct. 23, 1972	95	79	16	97.5	79	18.5	X-281-B, ICC 380
Aug. 19, 1973	98	81.5	16.5	100.5	81.5	19	X-295-A, ICC 397

Tariff Authority:

March 28, 1938 — C.F.A. Tariff 245-F, ICC 3055—5% Table Inc.

January 21, 1947 — C.F.A. Tariff 245-G, ICC 3356—15% Table Inc.

June 8, 1948 — C.F.A. Tariff 245-G, ICC 3356—25% Table Inc.

Sept. 26, 1949 — C.T.R. Tariff 245-H, ICC 4403—10% Table Inc.

April 5, 1956 — C.T.R. Tariff 245-H, ICC 4403—12% Table Inc.

July 10, 1956 — C.T.R. Tariff 245-H, ICC 4403—5% Table Inc.

May 10, 1956 — C.T.R. Tariff 245-H, ICC 4403—5% Table Inc.

October 18, 1957 — C.T.R. Tariff 245-H. ICC 4403—9% Table Inc.

June 1, 1958 — C.T.R. Tariff 245-H, ICC 4403—3% Table Inc.

March 10, 1960 — C.T.R. Tariff 245-H, ICC 4403—Sup. 150 (Reduction in Flat Rates)

October 24, 1960 — C.T.R. Tariff 245-H, ICC 4403—.5 cent Inc.*

August 19, 1967 — TL/CTR Tariff 245-I, ICC C-375—2 cents Inc.

November 28, 1968 — TL/CTR Tariff 245-I, ICC C-375—6% Table Inc.

November 18, 1969 — TL/CTR Tariff 245-I, ICC C-375—6% Table Inc.

November 20, 1970 — TL/CTR Tariff 245-I, ICC C-375—6% Table Inc.

April 12, 1971 — TL/CTR Tariff 245-I, ICC C-375—11%-G Table Inc.

October 23, 1972 — TL/CTR Tariff 245-I, ICC C-375—3%-G Table Inc.

August 19, 1973 — TL/CTR Tariff 245-I, ICC C-375—3%-G Table Inc.

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* .5 cent Increase in rates less than 65¢ cwt. and 1 cent Increase in rates over 65¢ cwt.

Appendix C
Statement Showing Flat and Proportional Rates and Corresponding Pads on Wheat from Chicago, Ill., to Eastern Trunk Line Basing Points from March 10, 1960, to August 19, 1973
(In Cents Per 100 Pounds)

To		Ex-Parte Increase Rate Level 295-A	281-B	267-B	265-B	262	259-B	256	223	212
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
New York, N.Y.	a	98	95	92	83	78	74	70	68	67
	b	81.5	79	76.5	69	65	61	57.5	55.5	55
	c	16.5	16	15.5	14	13	13	12.5	12.5	12
Albany, N.Y.	a	95.5	92.5	90	80	76	72	68	66	65
	b	79	76.5	74.5	66	63	59	55.5	53.5	53
	c	16.5	16	15.5	14	13	13	12.5	12.5	12
Baltimore, Md.	a	94	91.5	89	79	75	71	67	65	64
	b	76	74	72	64	61	58	54.5	52.5	52
	c	18	17.5	17	15	14	13	12.5	12.5	12
Belington, W. Va.	a	86	83.5	81	72	69	65	61	59	58
	b	67.5	65.5	63.5	57	54	51	48.5	46.5	46
	c	18.5	18	17.5	15	15	14	12.5	12.5	12
Boston, Mass.	a	101.5	98.5	95.5	85	81	76	72	70	69
	b	84	81.5	79	70	67	63	59.5	57.5	57
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Cumberland, Md.	a	86	83.5	81	72	69	65	61	59	58
	b	67.5	65.5	63.5	57	54	51	48.5	46.5	46
	c	18.5	18	17.5	15	15	14	12.5	12.5	12
Hagerstown, Md.	a	94	91.5	89	79	75	71	67	65	64
	b	76	74	72	64	61	58	54.5	52.5	52
	c	18	17.5	17	15	14	13	12.5	12.5	12
Newport News, Va.	a	94	91.5	89	79	75	71	67	65	64
	b	76	74	72	64	61	58	54.5	52.5	52
	c	18	17.5	17	15	14	13	12.5	12.5	12
Norfolk, Va.	a	94	91.5	89	79	75	71	67	65	64
	b	76	74	72	64	61	58	54.5	52.5	52
	c	18	17.5	17	15	14	13	12.5	12.5	12
Philadelphia, Pa.	a	95.5	92.5	90	80	76	72	68	66	65
	b	79	76.5	74.5	66	63	59	55.5	53.5	53
	c	16.5	16	15.5	14	13	13	12.5	12.5	12

To		Ex-Parte Increase Rate Level 295-A	281-B	267-B	265-B	262	259-B	256	223	212
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Rochester, N.Y.	a	88.5	86	83.5	75	71	67	63	61	60
	b	70.5	68.5	66.5	60	57	54	50.5	48.5	48
	c	18	17.5	17	15	14	13	12.5	12.5	12
Rockland, Me.	a	101.5	98.5	95.5	85	81	76	72	70	69
	b	84	81.5	79	70	67	63	59.5	57.5	57
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Strasburg, Va.	a	94	91.5	89	79	75	71	67	65	64
	b	76	74	72	64	61	58	54.5	52.5	52
	c	18	17.5	17	15	14	13	12.5	12.5	12
Syracuse, N.Y.	a	88.5	86	83.5	75	71	67	63	61	60
	b	70.5	68.5	66.5	60	57	54	50.5	48.5	48
	c	18	17.5	17	15	14	13	12.5	12.5	12
Utica, N.Y.	a	89.5	87	84.5	76	72	68	64.5	62.5	61.5
	b	71.5	69.5	67.5	61	58	55	52	50	49.5
	c	18	17.5	17	15	14	13	12.5	12.5	12

a—Flat Rate

b—Proportional Rate

c—Pad

Tariff Authority: TPO B.B. Maurer, C/TN-245-I, ICC C-375

X-295-A —Eff. 8/19/73
X-281-B —Eff. 10/23/72
X-267-B —Eff. 4/28/73 (Increase Table—Supp. 307, C/TN 245-I, ICC C-375)
X-265-B —Eff. 11/20/70
X-262 —Eff. 11/18/69
X-259-B —Eff. 11/28/68
X-256 —Eff. 8/19/67
X-223 —Eff. 7/1/63 (New Tariff Issue, TPO: H.R. Hinsch C/TN 245-I, ICC C-375)
X-212 —Eff. 3/10/60 (Reduction In Flat Rate From Chicago), TPO: H.R. Hinsch, Freight Tariff 245-H, ICC 4403, Supp. 193.

No. 35825

Appendix D

Statement Showing Flat and Proportional Rates and Corresponding Pads on Wheat Products from Chicago, Illinois to Eastern Trunk Line Basing Points from March 10, 1960 to August 19, 1973

(In Cents Per 100 Pounds)

To		Ex Parte Increase Rate Level 295-A	281-B	267-B	265-B	262	259-B	256	223	212
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
New York, N.Y.	a	100.5	97.5	94.5	85	80	75	70.5	68.5	67.5
	b	81.5	79	76.5	69	65	61	58	56	55.5
	c	19	18.5	18	16	15	14	12.5	12.5	12
Albany, N.Y.	a	96.5	93.5	91	82	77	73	68.5	66.5	65.5
	b	79	76.5	74.5	67	63	59	56	54	53.5
	c	17.5	17	16.5	15	14	14	12.5	12.5	12
Baltimore, Md.	a	95.5	92.5	90	81	76	72	67.5	65.5	64.5
	b	76	74	72	65	61	58	55	53	52.5
	c	19.5	18.5	18	16	15	14	12.5	12.5	12
Belington, W.Va.	a	86	83.5	81	73	69	65	61.5	59.5	58.5
	b	68.5	66.5	64.5	58	55	52	49	47	46.5
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Boston, Mass.	a	102.5	99.5	96.5	87	82	77	72.5	70.5	69.5
	b	85	82.5	80	72	68	64	60	58	57.5
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Cumberland, Md.	a	86	83.5	81	73	69	65	61.5	59.5	58.5
	b	68.5	66.5	64.5	58	55	52	49	47	46.5
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Hagerstown, Md.	a	95.5	92.5	90	81	76	72	67.5	65.5	64.5
	b	76	74	72	65	61	58	55	53	52.5
	c	19.5	18.5	18	16	15	14	12.5	12.5	12
Newport News, Va.	a	95.5	92.5	90	81	76	72	67.5	65.5	64.5
	b	76	74	72	65	o1	58	55	53	52.5
	c	19.5	18.5	18	16	15	14	12.5	12.5	12

To		Ex Parte Increase Rate Level 295-A	281-B	267-B	265-B	262	259-B	256	223	212
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Norfolk, Va.	a	95.5	92.5	90	81	76	72	67.5	65.5	64.5
	b	76	74	72	65	61	58	55	53	52.5
	c	19.5	18.5	18	16	15	14	12.5	12.5	12
Philadelphia, Pa.	a	96.5	93.5	91	82	77	73	68.5	66.5	65.5
	b	79	76.5	74.5	67	63	59	56	54	53.5
	c	17.5	17	16.5	15	14	14	12.5	12.5	12
Rochester, N.Y.	a	88.5	86	83.5	75	71	67	63.5	61.5	60.5
	b	70.5	68.5	66.5	60	57	54	51	49	48.5
	c	18	17.5	17	15	14	13	12.5	12.5	12
Rockland, Me.	a	102.5	99.5	96.5	87	82	77	72.5	70.5	69.5
	b	85	82.5	80	72	68	64	60	58	57.5
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Strasburg, Va.	a	95.5	92.5	90	81	76	72	67.5	65.5	64.5
	b	76	74	72	65	61	58	55	53	52.5
	c	19.5	18.5	18	16	15	14	12.5	12.5	12
Syracuse, N.Y.	a	88.5	86	83.5	75	71	67	63.5	61.5	60.5
	b	70.5	68.5	66.5	60	57	54	51	49	48.5
	c	18	17.5	17	15	14	13	12.5	12.5	12
Utica, N.Y.	a	90.5	88	85.5	77	73	69	65	63	62
	b	74	72	70	63	59	56	52.5	50.5	50
	c	16.5	16	15.5	14	14	13	12.5	12.5	12

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a—Flat Rate

b—Proportional Rate

c—Pad

Tariff Authority: TPO B.B. MAURER, C/TN 245-I, I.C.C. C-375

X-295-A —Eff. 8/19/73

X-281-B —Eff. 10/23/72

X-267-B —Eff. 4/28/73 (Increase Table—Supp. 307, C/TN 245-I, I.C.C. 375)

X-265-B —Eff. 11/20/70

X-262 —Eff. 11/18/69

X-259-B —Eff. 11/28/68

X-256 —Eff. 8/19/67

X-223 —Eff. 7/1/63 (New Tariff Issue, C/TN 245-I, I.C.C. C-375) TPO: H. R. Hinsch

X-212 —Eff. 3/10/60 (Reduction in Flat Rate From Chicago), TPO: H. R. Hinsch, Freight Tariff 245-H, I.C.C. 4403, Supp. 193

Appendix E

Statement Showing Flat and Reshipping Rates also "Pads" from Chicago to Eastern Trunk Line Destinations on Barley, Corn, Grain Sorghums and Oats (In Cents Per 100 Pounds)

	(Eff. 8-19-73) X-295-A			(Eff. 10-23-72) X-281-B			(Eff. 4-12-71) X-267-B		
(1)	(2) Flat	(3) Res.	(4) Pad	(5) Flat	(6) Res.	(7) Pad	(8) Flat	(9) Res.	(10) Pad
Albany, N. Y.	66	61	5.0	64	59	5.0	62	57.5	4.5
Baltimore, MD.	65	59.5	5.5	63	58	5.0	61	56.5	4.5
Belington, W. Va.	53	48.5	4.5	51.5	47	4.5	50	45.5	4.5
Boston, Mass.	79	71.5	7.5	76.5	69.5	7.0	74.5	67.5	7.0
Cumberland, MD.	54	48.5	5.5	52.5	47	5.5	51	45.5	5.5
Hagerstown, MD.	59.5	53	6.5	58	51.5	6.5	56.5	50	6.5
New York, N. Y.	74	67.5	6.5	72	65.5	6.5	70	63.5	6.5
Newport News, Va.	74	67.5	6.5	72	65.5	6.5	70	63.5	6.5
Norfolk, Va.	74	67.5	6.5	72	65.5	6.5	70	63.5	6.5
Philadelphia, Pa.	68.5	64	4.5	66.5	62	4.5	64.5	60	4.5
Rochester, N. Y.	53	48.5	4.5	51.5	47	4.5	50	45.5	4.5
Rockland, Me.	86	80.5	5.5	83.5	78	5.5	81	75.5	5.5
Strasburg, Va.	63	56.5	6.5	61	55	6.0	59	53.5	5.5
Syracuse, N. Y.	58.5	53	5.5	57	51.5	5.5	55.5	50	5.5
Utica, N. Y.	61	54	7.0	59	52.5	6.5	57.5	51	6.5

Tariff Authority: TPO Maurer's TL/CTR E-1009-A, ICC C-391; TL/CTR E-772-G, ICC C-945

Appendix F

Statement Showing Proposed Wheat and Wheat Products Rates from Chicago to Eastern Basing Points Reflecting the 6.5¢ cwt. "PAD"

(Cents Per 100 Pounds—X-295-A Level)

	Wheat			Wheat Products		
To	Flat	Prop	Pad	Flat	Prop	Pad
(1)	(2)	(3)	(4)	(5)	(6)	(7)
New York, N.Y.	88	81.5	6.5	88.5	82	6.5
Albany, N.Y.	84.5	78	6.5	85	78.5	6.5
Baltimore, Md.	85	78.5	6.5	85.5	79	6.5
Belington, W. Va.	75	68.5	6.5	75.5	69	6.5
Boston, Ma.	90	83.5	6.5	90.5	84	6.5
Cumberland, Md.	75	68.5	6.5	75.5	69	6.5
Hagerstown, Md.	85	78.5	6.5	85.5	79	6.5
Newport News, Va.	85	78.5	6.5	85.5	79	6.5
Norfolk, Va.	85	78.5	6.5	85.5	79	6.5
Philadelphia, Pa.	86	79.5	6.5	86.5	80	6.5
Rochester, N.Y.	77.5	71	6.5	78	71.5	6.5
Rockland, Me.	90	83.5	6.5	90.5	84	6.5
Strasburg, Va.	85	78.5	6.5	85.5	79	6.5
Syracuse, N.Y.	77.5	71	6.5	78	71.5	6.5
Utica, N.Y.	80	73.5	6.5	80.5	74	6.5

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Appendix G

Statement Showing Wheat Receipts in Bushels at Chicago For a Series of Years Via Rail, Motor Carrier and Water, also Percent of Total Via Each Mode (000 Bushels Omitted)

Year	Total Wheat Receipts	Rail Receipts	% of Total	Truck Receipts	% of Total	Barge-Lake Receipts	% of Total
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1972	17024	3780	22.2	11655	68.5	1589	9.3
1971	18502	3746	20.2	10015	54.1	4741	25.6
1970	20610	5049	24.5	6013	29.2	9548	46.3
1969	20241	5697	28.1	8934	44.1	5610	27.7
1968	26025	7628	29.3	10270	39.5	8127	31.2
1967	35156	11358	32.3	12677	36.1	11121	31.6
1966	25986	9677	37.2	7847	30.2	8462	32.6
1965	30247	8639	28.6	7255	24.0	14353	47.5
1964	33581	10864	32.4	9297	27.7	13420	40.0
1963	33481	11928	35.6	10451	31.2	11102	33.2

Source: Annual Statistics Chicago Board of Trade.

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Appendix H

Statement of Inbound Receipts of Wheat at Dixie Portland Flour Mill, and Outbound Shipments of Products Via Rail and Motor Carrier

(In Pounds 000 Omitted)

	Rail		Truck		* Rail
	Wheat Receipts	Products Shipments	Wheat Receipts	Products Shipments	Non-Transit Shipments
1969	272,484	187,642	144,384	246,390	
1970	243,289	154,388	108,401	222,091	
1971	163,428	136,188	353,412	273,953	50,777
1972	214,943	100,847	241,109	309,330	42,048
1973	46,070	50,931	132,720	152,717	10,397
Jan.-June					

* Rail Shipment of Millfeeds Under Non Transit Mileage Rates In

TPO: Maurer's TL/CTR-E-772-G, ICC C-945.

No. 35825

Appendix I

Statement of Flat and Proportional Rates from Chicago and Competitive Points to New York (Domestic) together with Applicable Pad Rates in Cents Per 100 Lbs. (Ex Parte 295-A Level)

Origin	Wheat			Wheat Products		
	Flat Rate	Proportional Rate	Pad	Flat Rate	Proportional Rate	Pad
Chicago, Ill.	98	81½	16½	100½	81½	19
Manitowac, Wis.	98	81½	16½	100½	81½	19
Milwaukee, Wis.	98	81½	16½	100½	81½	19
Peoria-Pekin, Ill.	(a) 119	(c) 86	33	(a) 119	(c) 86	33
	(b) 103½	(c) 86	17½	(b) 103½	(c) 86	17½
Decatur, Ill.	(a) 119	(c) 86	33	(a) 119	(c) 86	33
	(b) 103½	(c) 86	17½	(b) 103½	(c) 86	17½
Springfield, Ill.	(a) 119	(c) 86	33	(a) 119	(c) 86	33
	(b) 103½	(c) 86	17½	(b) 103½	(c) 86	17½
East St. Louis Ill. St. Louis, Mo.	(a) 119	90½	28½	(a) 120	90½	29½
	(b) 103½	90½	13	(b) 103½	90½	13
Quincy, Ill.	(a) 127	90½	36½	(a) 128	90½	37½
	(b) 112	90½	21½	(b) 112	90½	21½

(a) Flat rate subject to comparable conditions as applicable to Chicago flat rate.

(b) Flat rate subject to no more than two transit privileges and non-application of Rule 24 of the Classification (freight in excess of full carload rule).

(c) Proportional rate except on traffic originating in Northwest Territory. The applicable proportional rate on traffic originating in Northwest Territory is the same as from Chicago, Ill. viz: 81½.

Tariff Reference: TL-CTR TB 245-I, ICC C-375

No. 35825

Appendix J

Annual from Chicago Shipments of Wheat (Bushels)

(000 Omitted)

Year	Lake Vessel To				Via			
	US Ports	Canadian Ports	Overseas Ports	Total	Barge	Rail	Truck	Total
1962	5,272	—	130	5,402	1,145	9,275	22	15,844
1963	4,698	2,604	599	7,901	3,114	9,982	29	21,026
1964	7,708	1,377	—	9,085	5,719	10,315	9	25,129
1965	10,315	3,878	168	14,361	423	7,151	1	21,936
1966	4,743	1,185	—	5,928	240	8,494	26	14,688
1967	8,404	189	88	8,681	2,109	5,300	103	16,193
1968	5,798	212	58	6,068	4,574	10,089	153	20,884
1969	2,317	661	—	2,978	1,838	7,456	47	12,319
1970	2,826	999	991	4,816	—	6,742	31	11,589
1971	1,340	550	1,064	2,954	—	3,462	26	6,442

SOURCE: Annual Statistics Chicago Board of Trade

No. 35825

Annual Chicago Shipments of Flour (Sacks)

(000 Omitted)

Year	VIA Lake Vessel	Barge	Rail	Truck	Total
1962	750	—	6,258	—	7,008
1963	—	—	6,733	—	6,733
1964	—	—	6,515	—	6,515
1965	—	—	5,584	—	5,584
1966	—	—	5,857	—	5,857
1967	—	—	4,530	—	4,530
1968	—	—	4,341	—	4,341
1969	—	—	6,972	—	6,972
1970	—	—	6,912	—	6,912
1971	—	—	5,454	—	5,454

SOURCE: Annual Statistics Chicago Board of Trade

No. 35825

Appendix K

Chicago-East Bound Rail Shipments of Wheat and Flour—(1958-1966)

(000 Omitted)

Year	Wheat (Bushel)	Flour (Sacks)
1958	9,293	2,842
1959	7,552	1,739
1960	6,199	1,804
1961	4,864	1,804
1962	3,468	1,374
1963	1,529	1,203
1964	679	954
1965	2,353	771
1966	133	841

SOURCE: Annual Statistics Chicago Board of Trade, 1966.

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Appendix L

Shipments of Wheat, Bran, Middlings, and Wheat Flour Handled by B&O in 1972 from Origin Points in Illinois, (including St. Louis, Mo.), Indiana, Michigan (lower peninsula) and Ohio, including the Buffalo, N. Y. area, and Destined to Buffalo, New York, Pittsburgh, Pa., and Official Territory Points East Thereof. An attempt was made to exclude export traffic.

WHEAT—STCC NO. 01-137-10

From	Cars	Tons	B&O Revenue
Illinois (including St. Louis, Mo.)	11	720	$ 11,396
Indiana	10	495	3,877
Michigan (lower peninsula)	—	—	—
Ohio	360	29,563	238,090
Buffalo, N.Y. Area	—	—	—
Total	381	30,778	$253,363

WHEAT FLOUR—STCC NO. 20-411-10

Illinois (including St. Louis, Mo.)	251	9,763	$ 62,561
Indiana	202	5,968	44,898
Michigan (lower peninsula)	98	3,003	24,358
Ohio	783	45,036	184,529
Buffalo, N.Y. Area	805	26,176	192,750
Total	2,139	89,946	$509,096

MIDDLINGS—STCC NO. 20-412-10

Illinois (including St Louis, Mo.)	47	1,789	$13,178
Indiana	3	193	1,168
Michigan (lower peninsula)	16	637	6,922
Ohio	464	17,947	37,190
Buffalo, N.Y. Area	71	2,887	13,957
Total	601	23,453	$72,415

BRAN-STCC NO. 20-412-20

From	Cars	Tons	B&O Revenue
Illinois (including St. Louis, Mo.)	20	652	$ 6,637
Indiana	—	—	—
Michigan (lower peninsula)	2	70	610
Ohio	327	9,349	11,397
Buffalo, N.Y. Area	68	2,041	9,887
Total	417	12,112	$28,531

GRAIN FLOUR, NEC—STCC NO. 20-419-92

Illinois (including St. Louis, Mo.)	—	—	$ —
Indiana	10	257	2,041
Michigan (lower peninsula)	5	144	922
Ohio	109	6,795	-3,306
Buffalo, N.Y. Area	—	—	—
Total	124	7,196	$ -343

FLOUR EDIBLE, NEC—STCC NO. 20-452-90

Illinois (including St. Louis, Mo.)	225	8,830	$ 72,205
Indiana	5	129	1,746
Michigan (lower peninsula)	10	338	3,761
Ohio	119	4,824	23,302
Buffalo, N.Y. Area	51	1,416	10,704
Total	410	15,537	$111,718

TOTAL WHEAT AND WHEAT PRODUCTS—YEAR 1972

Illinois (including St. Louis, Mo.)	554	21,754	$165,977
Indiana	230	7,042	53,730
Michigan (lower peninsula)	131	4,192	36,573
Ohio	2,162	113,514	491,202
Buffalo, N.Y. Area	995	32,520	227,298
GRAND TOTALS	4,072	179,022	$974,780

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Appendix M

Breakdown of Tonnage and Revenue Figures Contained In Verified Statement of T. E. Sellinger (Exhibit 11)— By State of Origin and Commodity (Penn Central-1972)

Origins	Commodity	Cars[1]	Tons	Revenue
Illinois	Wheat (01-137-10)	69	4,284	48,917
(Includes St. Louis, Mo.)	Wheat Flour (20-411-10)	2,549	104,354	1,276,934
	Semolina & Flour Mixture (20-411-15)	9	328	6,131
	Wheat Middlings or Shorts (20-412-10)	218	8,885	77,716
	Wheat Bran & 2½% other ingredients (20-412-15)	30	825	6,182
	Wheat Bran (20-412-20)	39	1,125	11,028

[1] All shipments of wheat to Albany, Baltimore, and Norfolk were eliminated so as to exclude export traffic. Some domestic traffic could have been also eliminated. The same procedure was not followed in connection with the figures on flour because New York City receives a great deal of domestic flour. However, apparently there are no flour mills in Philadelphia, Baltimore, and Norfolk.

Origins	Commodity	Cars	Tons	Revenue
	Compound Flour, Grain with other ingredients not exceeding 40% (20-452-30)	65	2,021	27,383
	Flour, edible NEC (20-452-90)	915	27,923	391,193
	TOTALS	3,894	149,745	1,845,538
Indiana	Wheat (01-137-10)	106	11,103	138,919
	Wheat Flour (20-411-10)	1,354	46,543	285,363
	Semolina & Flour Mixture (20-411-15)	1	27	49
	Semolina (20-411-25)	1	42	393
	Wheat Middlings or Shorts (20-412-10)	107	4,521	28,338
	Wheat Bran (20-412-20)	4	128	1,400
	Flour, edible NEC (20-452-90)	234	6,763	41,158
	TOTALS	1,807	69,127	495,619
Michigan (Lower Peninsula)	Wheat (01-137-10)	22	1,317	10,835
	Wheat Flour (20-411-10)	1,811	69,911	440,285

Origins	Commodity	Cars	Tons	Revenue
	Wheat Middlings or Shorts (20-412-10)	887	42,404	155,583
	Wheat Bran (20-412-20)	289	7,683	31,786
	Compound, Flour, grain with other ingredients not exceeding 40% (20-452-30)	644	20,142	157,264
	Flour, edible NEC (20-452-90)	75	3,093	23,785
	TOTALS	3,728	144,550	819,538
Ohio	Wheat (01-137-10)	1,414	109,082	1,106,389
	Wheat Flour (20-411-10)	1,729	92,474	456,417
	Semolina & Flour Mixture (20-411-15)	3	153	1,606
	Semolina (20-411-25)	3	135	879
	Wheat Middlings or Shorts (20-412-10)	1,205	50,959	231,373
	Wheat Bran & 2½% other ingredients (20-412-15)	4	115	1,130
	Wheat Bran (20-412-20)	553	15,748	77,618

Origins	Commodity	Cars	Tons	Revenue
	Compound, Flour, grain with other ingredients not exceeding 40% (20-452-30)	1	5	116
	Flour, edible NEC (20-452-90)	336	9,797	132,269
	TOTALS	5,258	278,468	2,007,797
New York Only Buffalo Niagara Falls Lockport	Wheat (01-137-10)	249	18,403	116,569
	Wheat Flour (20-411-10)	16,184	603,076	4,164,998
	Semolina & Flour Mixture (20-411-15)	6	206	1,913
	Semolina (20-411-25)	45	2,215	19,246
	Wheat Middlings or Shorts (20-412-10)	2,602	105,765	770,978
	Wheat Bran (20-412-20)	335	10,293	66,519
	Compound, Flour, grain with other ingredients not exceeding 40% (20-452-30)	3	62	764
	Flour, edible, [illegible] (20-452-90)	442	16,489	64,330
	TOTALS	19,866	756,509	5,205,317
	GRAND TOTALS	34,553	1,398,399	10,373,809

No. 35825

Appendix N

Tonnage of Wheat and Wheat Products Originated in 1972 at Principal Points in the States Named in the Verified Statement of T. E. Sellinger (Exhibit 11), Including Revenue Derived Therefrom (Penn Central)

Origin	Commodity	Cars	Tons	Revenue
Chicago	Wheat 01-137-10	43	2,615	29,261
	Wheat Flour 20-411-10	141	5,970	80,238
	Semolina & Flour Mixture 20-411-15	5	211	2,804
	Wheat Middlings or Shorts 20-412-10	180	7,402	62,815
	Wheat Bran 20-412-20	39	1,125	11,028
	Compound Flour grain with other ingredients not exceeding 40% 20-452-30	21	650	8,574
	Flour, edible, NEC 20-452-90	345	8,747	148,855
	TOTAL	774	26,720	343,575
Peoria, Ill.	Wheat Flour 20-411-10	5	153	2,245
	Semolina & Flour Mixture 20-411-15	1	20	600

Origins	Commodity	Cars	Tons	Revenue
	Flour, edible, NEC 20-452-90	5	134	755
	TOTAL	11	307	3,600
Springfield, Ill.	Wheat Flour 20-411-10	644	27,389	215,254
	Semolina & Flour Mixture 20-411-15	1	46	998
	Wheat Middlings or Shorts 20-412-10	22	779	6,386
	Wheat Bran & 2½% other ingredients 20-412-15	30	825	6,182
	Flour, edible, NEC 20-452-90	215	8,295	73,103
	TOTAL	911	37,334	301,923
Indianapolis	Wheat 01-137-10	9	743	10,251
	Wheat Flour 20-411-10	1,024	35,898	127,868
	Semolina & Flour Mixture 20-411-15	1	27	49
	Wheat Middlings or Shorts 20-412-10	79	3,301	17,173
	Flour, edible, NEC 20-452-90	3	82	166
	TOTAL	1,116	40,051	155,507

Origins	Commodity	Cars	Tons	Revenue
Chelsea, Mi.	Wheat Flour 20-411-10	125	3,959	45,921
	Wheat Middlings or Shorts 20-412-10	138	9,247	18,452
	Wheat Bran 20-412-20	4	146	1,382
	TOTAL	267	13,352	65,755
Detroit, Mi.	Wheat Flour 20-411-10	500	19,065	78,460
	Wheat Middlings or Shorts 20-412-10	375	15,910	66,276
	TOTAL	875	34,975	144,736
Hillsdale, Mi.	Wheat Flour 20-411-10	608	22,200	88,537
	Wheat Middlings or Shorts 20-412-10	347	14,393	58,249
	Wheat Bran 20-412-20	255	6,517	23,391
	Compound, Flour grain with other ingredients not exceeding 40% 20-452-30	676	20,480	158,149
	Flour, edible, NEC 20-452-90	13	448	1,938
	TOTAL	1,899	64,038	330,264

Origins	Commodity	Cars	Tons	Revenue
Buffalo, N.Y.	Wheat 01-137-10	116	10,214	82,408
	Wheat Flour 20-411-10	16,177	602,840	4,163,865
	Semolina & Flour Mixture 20-411-15	6	206	1,913
	Wheat Middlings or Shorts 20-412-10	2,602	105,765	770,978
	Semolina 20-411-25	45	2,215	19,246
	Wheat Bran 20-412-20	335	10,293	66,519
	Compound, Flour grain with other ingredients not exceeding 40% 20-452-30	2	47	466
	Flour, edible NEC 20-452-90	58	1,553	14,563
	TOTAL	19,341	733,133	5,119,958
Fostoria, Oh.	Wheat 01-137-10	43	4,041	24,179
	Wheat Flour 20-411-10	257	11,803	101,713
	Wheat Middlings or Shorts 20-412-10	49	1,893	13,145
	Wheat Bran 20-412-20	32	960	3,891

Origins	Commodity	Cars	Tons	Revenue
	Flour, edible, NEC 20-452-90	1	22	82
	TOTAL	382	18,719	143,010
Toledo, Oh.	Wheat 01-137-10	367	31,914	172,947
	Wheat Flour 20-411-10	893	49,833	192,774
	Semolina & Flour Mixture 20-411-15	1	15	108
	Wheat Middlings or Shorts 20-412-10	572	21,088	99,914
	Wheat Bran & 2½% other ingredients 20-412-15	4	115	1,130
	Wheat Bran 20-412-20	376	10,828	46,467
	Flour, edible, NEC 20-452-90	52	1,343	18,926
	TOTAL	2,265	115,136	532,266
St. Louis, Mo.	Wheat Flour 20-411-10	1,048	45,755	620,227
	Compound, Flour grain with other ingredients not exceeding 40% 20-452-30	1	14	460
	Flour, edible NEC 20-452-90	10	298	5,786
	TOTAL	1,059	46,067	626,473

No. 35825

Appendix O

Traffic Handled by N&W in 1972 From and To the Indicated Points, and Its Revenues Therefrom. (Export Traffic Excluded When Possible)

From	Commodity	Cars	Tons	Revenue
Chicago, Ill.	Wheat	164	7,264	$ 85,381
Peoria, Ill.	01137	0	0	0
Springfield, Ill.		0	0	0
Indianapolis, Ind.		0	0	0
St. Louis, Mo.		12	1,109	13,819
Buffalo, N.Y.		0	0	0
Fostoria, Ohio		57	4,931	33,658
Toledo, Ohio		276	16,846	136,861
		509	40,050	269,719
Chicago, Ill.	Flour	149	4,787	44,864
Peoria, Ill.	2041110	8	251	2,977
Springfield, Ill.	15	1,366	55,348	368,017
	20			
Indianapolis, Ind.		112	3,419	11,855
St. Louis, Mo.		340	11,520	103,089
Buffalo, N.Y.		149	4,349	13,676
Fostoria, Ohio		301	12,583	45,495
Toledo, Ohio		636	42,782	139,409
		3,061	135,039	729,382
Chicago, Ill.	Wheat Mids &	38	1,526	9,587
Peoria, Ill.	Shorts	0	0	0
Springfield, Ill.	2041210	382	14,369	34,987
Indianapolis, Ind.		11	464	2,159

From	Commodity	Cars	Tons	Revenue
St. Louis, Mo.		4	401	3,040
Buffalo, N.Y.		1	42	45
Fostoria, Ohio		103	4,075	14,264
Toledo, Ohio		1,157	46,754	175,747
		1,696	67,631	$241,829
Chicago, Ill.	Wheat-Bran	6	175	662
Peoria, Ill.	2041220	0	0	0
Springfield, Ill.		0	0	0
Indianapolis, Ind.		0	0	0
St. Louis, Mo.		0	0	0
Buffalo, N.Y.		0	0	0
Fostoria, Ohio		44	1,297	6,655
Toledo, Ohio		404	11,895	38,601
		454	13,367	45,918
Chicago, Ill.	Flour, Edible,			
Peoria, Ill.	NEC			
Springfield, Ill.	2045290	450	18,677	207,170
Indianapolis, Ind.		0	0	0
St. Louis, Mo.		1	25	319
Buffalo, N.Y.		0	0	0
Fostoria, Ohio		0	0	0
Toledo, Ohio		2	158	842
		541	21,347	$234,931
GRAND TOTALS		6,261	227,434	$1,521,779

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ANHEUSER-BUSCH, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, ET AL.

AMERICAN BAKERS ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1721

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

No. 76-1795

ANHEUSER-BUSCH, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, ET AL.

No. 76-1870

AMERICAN BAKERS ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

No. 77-24

THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Wheat arriving in Chicago from the west is deposited in grain elevators without regard to whether it was transported by truck, rail, lake steamer, or barge. The cost to

rail carriers of transporting wheat from Chicago to the east does not vary according to the mode of transport by which such wheat reached Chicago. However, the railroads in the past have charged higher rates for transporting to the east wheat that arrived in Chicago via truck than for transporting wheat that arrived in Chicago by the other modes. Ex-rail, ex-lake, and ex-barge wheat has been accorded a through or "proportional" rate for reshipment to the east. Ex-motor wheat has been treated as having originated in Chicago and is charged a substantially higher "local" rate (Pet. App. A, p. a-3).[1]

The Chicago Board of Trade complained to the Interstate Commerce Commission that the reshipment rate on ex-motor wheat was unreasonably discriminatory. The hearing examiner found that, on the facts before him, the higher ex-motor rates were unjustifiably discriminatory under Section 2 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 2 (Pet. App. D, pp. d-25 to d-32). The Commission adopted his decision (Pet. App. C), and the court of appeals affirmed (Pet. App. A).

The decision of the court of appeals is correct and there is no reason for further review. The Commission's decision rested on the finding that rail service to the east and the costs thereof are the same "whether the wheat arrived at the mill or elevator by rail, water or truck" (Pet. App. D, p. d-30), and that the restriction against allowing proportional rates to ex-motor wheat "inhibited and damaged [the complainants] in the conduct of their businesses of buying and selling wheat and wheat products and in the

---

[1]In 1973 the proportional rate for wheat shipped from Chicago to New York was 81.5 cents per hundred weight as compared to the local rate for the same movement of 98 cents per hundred weight (Pet. App. A, pp. a-3 to a-4). "Pet. App." refers to the appendix to the petition in No. 76-1721.

shipping thereof" (*ibid.*). The Commission concluded that these facts rendered the case indistinguishable from *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, and *James McWilliams Blue Line, Inc.* v. *United States*, 100 F. Supp. 66 (S.D. N.Y.), affirmed *per curiam*, 342 U.S. 951.

In *Mechling*, the Court held that ex-barge proportional rates on wheat reshipments from Chicago to eastern points that had been fixed by the Commission at a level higher than ex-rail and ex-lake rates discriminated against barge carriers in violation both of Section 2 and of provisions of the Transportation Act of 1940 intended to preserve the inherent cost advantages of water transportation. 330 U.S. at 576-577. In *Blue Line*, the district court held unlawfully discriminatory under Section 2 rail rates on coal to New Haven, Connecticut, that were higher if the following movement was by barge rather than by rail. This Court's affirmance cited only *Mechling*.

There is no need for this Court to re-examine the Commission's determination, which has been thoroughly considered by the court of appeals. Once the Commission found that the ex-motor rate was unjustifiably discriminatory, it was required by Section 2 to order its elimination from petitioners' tariffs. In light of the Commission's findings, as the court of appeals observed (Pet. App. A, p. a-10), "[p]etitioners' argument that the truck-rail transportation of grain is a local movement whereas the rail-barge, lake-rail movement is a through movement is beside the point."[2]

---

[2]Petitioners' claim that elimination of the discrimination will disrupt existing rate structures is similarly beside the point. Since the discrimination is unjustifiable, the rate structures resting upon that discrimination are unlawful. Cf. *American Trucking Associations, Inc.* v. *Atchinson, T & S.F. Ry. Co.*, 387 U.S. 397.

Petitioners, contending that *Mechling* applies only to ex-barge traffic and rests solely upon the 1940 Act's special protections for water traffic, rely upon this Court's earlier decision in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671. In that case, the Court sustained the Commission's discretionary determination that rail tariffs denying ex-barge traffic proportional rates upon reshipment were not unreasonable absent proof that the discrimination against such traffic was unjustifiable. The Court did not hold, however, that the Commission is required to allow rail rates to vary according to the mode of transportation used to move the goods to their rail shipping point where, as here, those rates are found to be unjustifiably discriminatory. In *Inland Waterways* the Court expressly noted that the Commission had done no more than reject the claim that imposition of local rates on ex-barge reshipments was *per se* unreasonable; the question whether such rates were unduly prejudicial or otherwise in violation of the Act was reserved for a later proceeding. 319 U.S. at 685-687. See also *Interstate Commerce Commission* v. *Mechling, supra*, 330 U.S. at 572. Moreover, in *Inland Waterways* the Commission did not consider whether the ex-barge shipments were from the same ultimate origins as the ex-rail shipments (319 U.S. at 683-686), whereas here the order complained of is limited to failure to maintain "like rates and charges, at the same levels, and *from and to the same points* * * * where the prior movement to Chicago is by for-hire motor carrier" (emphasis supplied) (Pet. App. D, p. d-31). Thus the Commission's decision in this case is not inconsistent with *Inland Waterways*.

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,
Interstate Commerce Commission.

SEPTEMBER 1977.

DOJ-1977-09

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1721

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., et al., *Petitioners,*

vs.

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AMERICAN BAKERS ASSOCIATION, *Petitioner,*

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THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC., *Petitioner,*

vs.

UNITED STATES, et al.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT BOARD OF TRADE OF THE CITY OF CHICAGO IN OPPOSITION

HAROLD E. SPENCER
20 North Wacker Drive
Chicago, Illinois 60606
Attorney for Respondent, Board of Trade of the City of Chicago

BELNAP, McCARTHY, SPENCER, SWEENEY & HARKAWAY
Of Counsel

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No. 76-1721

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT BOARD OF TRADE OF THE CITY OF CHICAGO IN OPPOSITION

The Board of Trade of the City of Chicago (Board of Trade) respectfully submits this brief in opposition to the petitions for a writ of certiorari filed by petitioners, The Atchison, Topeka and Santa Fe Railway Company, et al., Anheuser-Busch, Inc., American Bakers Association, and The Board of Trade of Kansas City, Missouri, Inc.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 549 F.2d 1186. It is reproduced as Appendix A to the petition in No. 76-1721 (RR Pet.). The decision and order of the Interstate Commerce Commission affirming and adopting the initial decision of the Administrative Law Judge and the initial decision of the Administrative Law Judge are reproduced as Appendices C and D to the railroad petition.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this court pursuant to 28 U.S.C. §§1254(1) and 2350(a).

QUESTION PRESENTED

Whether the unanimous determinations of the Administrative Law Judge, the Interstate Commerce Commission, and the Court of Appeals for the Eighth Circuit that the railroad rates here involved are unduly discriminatory in violation of section 2 of the Interstate Commerce Act should be further reviewed by this court.

STATUTE INVOLVED

Section 2 of the Interstate Commerce Act, 49 U.S.C. §2, reads as follows:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

STATEMENT OF THE CASE

Foreword

We must respectfully dissent from the petitioners' statements of the case in several respects. These statements, which are highly editorialized, state as facts many things about which there is substantial dispute. The petitioners state as a fact (e.g., RR Pet., p. 4) that the railroads maintain through routes and rates with other railroads, lake vessels, and barges; indeed they base their whole argument on this false assumption. Similar statements appear throughout all the petitions. The Board of Trade strongly disputes such an unfounded assertion. The Court of Appeals found (p. 1191, RR Pet., p. a-10) that whether the ex-barge and ex-lake movements were on through routes was "beside the point", with which the Board of Trade completely agrees. Nevertheless it should not be assumed that the ex-rail, ex-barge, and ex-lake movements are on "through routes", as we shall show in the argument portion of this brief (*infra*, pp. 13-16).

The railroad petitioners also say that the Commission has "held that proportional rates may be limited to through routes". To our knowledge the Commission has

never so held.[1] On the contrary, proportional rates are common where no through routes exist. *Chicago and Wisconsin Points Proportional Rates,* 10 M.C.C. 556, 562 (1938); *Refund Provisions, Lake Cargo Coal,* 299 I.C.C. 659 (1957). In the latter case, in almost exactly the same circumstances as are here presented, the Commission found no through routes, as that term is used in the Act, existed.

The background and nature of the controversy.

This case involves the validity of a report and order of the Interstate Commerce Commission originally made by an administrative law judge and adopted by the Commission as its own. That report found that the proportional or reshipping rates and charges on wheat and wheat products from Chicago, Ill., to the east, maintained by the railroads who were defendants in the action before the Commission (petitioners in No. 76-1721 here), where the prior movement of the commodities to Chicago is by railroad, lake vessel, or barge, without maintaining like rates and charges at the same levels and from and to the same points on the same commodities where the prior movement to Chicago is by for-hire motor carrier, is unjustly discriminatory in contravention of the provisions of section 2 of the Interstate Commerce Act (the Act).[2] The report

[1] No case cited by petitioners so holds. The Commission has never, to our knowledge, defined proportional rates in terms of "routes." The injection of "routes" into petitioners' definition of proportional rates is their own invention. See note 2, below. A through shipment does not necessarily imply a "through route." *Routing Restrictions Over Seatrain Lines,* 296 I.C.C. 767, 775 (1955).

[2] Essential to an understanding of the facts is a knowledge of the meaning of some of the technical rate terminology employed in the decisions. In *Grain and Grain Products,* 164 I.C.C. 619, 633 (1930), (footnote continued)

and order of the Commission were entered, after hearing, in response to a complaint filed by the Board of Trade with the Commission on April 9, 1973. By order entered February 17, 1976, the Commission denied petitions of the railroads and others seeking a declaration that the proceedings involved an issue of general transportation importance.

The orders of the Commission were reviewed by the United States Court of Appeals for the Eighth Circuit, which found (p. 1191, RR Pet. p. a-10):

(footnote continued)

the Commission defined various methods of ratemaking as follows:

> There are three different bases of rates available on wheat to and from the primary markets, namely, (1) combination of flat rates in and out; (2) combination of flat rates in and proportional or reshipping rates out; and (3) overhead rates with transit. These and other rate descriptive terms used herein may be defined as follows:
>
> A flat rate is either a local rate of a single carrier or a joint rate of two or more carriers published as a unit and not dependent for application on any previous or subsequent transportation.
>
> A proportional rate is a local or joint rate dependent for application upon (1) a previous transportion to the point from which the proportional rate applies; (2) a subsequent transportation from the point to which the proportional rate applies: (3) or both. It is supposed to be a part of a through rate and is usually lower than the flat rate between the same points.
>
> * * *
>
> A reshipping rate is the same thing as a proportional rate.
>
> An ex-lake rate is a proportional rate, applicable from lower lake ports to the East on shipments previously transported across the Great Lakes.

Likewise ex-rail, ex-barge, and ex-truck traffic means traffic brought to the proportional rate point (Chicago in this case) by rail, barge, or truck.

> . . . we agree with the Commission that the rates here under attack are discriminatory as a matter of law under 49 U.S.C. §2.

The grain rates from Illinois to the east and within the east are exceedingly complex. They consist essentially of a basic adjustment which has been in effect for many years but which has, in the last ten years or so particularly, become so overlaid with numerous individual rate adjustments which have completely changed the character of grain rates in eastern territory that there is now no such thing as "a grain-rate structure" in the east. The basic rate adjustment dates from April 1907. The history of these rates has been described in detail in *Grain Rates in Central Freight Association Territory,* 28 I.C.C. 549, 555-557 (1913); *Peoria Board of Trade* v. *A., T., & S. F. Ry. Co.,* 55 I.C.C. 442, 44, 45 (1919); *Grain and Grain Products,* 164 I.C.C. 619, 668-669 (1930); *Grain and Grain Products,* 205 I.C.C. 301, 380-382 (1934); *Grain and Grain Products,* 215 I.C.C. 83, 103-105 (1936); *Cooperative Grain League Fed. Exc.* v. *Akron, C. & Y. R. Co.,* 323 I.C.C. 174, 179-182 (1964).

At the outset, the rates from Illinois to the east consisted of overhead joint one-factor rates in which both the western lines and the eastern lines joined. There were also in effect from Chicago to the east reshipping or proportional rates, which were equal to the divisions which the eastern lines took out of the joint overhead rates for their service east of Chicago. The reshipping or proportional rates were applicable on grain brought to Chicago by lake or by barge and also by rail from points west of Illinois from which there were no joint overhead rates.[3]

[3] The all-rail joint overhead rates via Chicago have since been cancelled. Wheat arriving at Chicago by rail moving to the east moves on proportional rates the same as ex-lake and ex-barge wheat.

While there has always been much grain moved by lake to Chicago, the barge movement was insignificant up to 1933, when the Illinois Waterway was opened. From that time on, large amounts of grain began to move by barge over the Illinois Waterway to Chicago. None of this grain moved on rates subject to regulation by the ICC until 1940. All of it, however, was entitled to engage the rail reshipping or proportional rates from Chicago to the east.

Because of this great increase in the unregulated barge movement to Chicago, the eastern railroads initiated proceedings to restrict the proportional rates so that they would not apply on ex-barge grain, although they would continue to apply on ex-lake, and ex-rail grain. The Commission upheld this restriction in *Grain Proportionals, Ex-Barge to Official Territory,* 248 I.C.C. 307 (1941).[4]

The action of the Commission in approving the restriction of the proportional rates against ex-barge traffic was upheld by this court in *Interstate Commerce Comm'n.* v. *Inland Waterways Corp.,* 319 U.S. 671 (1943).

In further proceedings the Commission again approved the restriction but prescribed special proportional rates on ex-barge traffic higher than those on ex-rail and ex-lake traffic. *Grain Proportionals, Ex-Barge to Official Territory,* 262 I.C.C. 7 (1945). This time, however, this court reversed the Commission in *Interstate Commerce Comm'n.* v. *Mechling,* 330 U.S. 567 (1947), with a finding that such

[4] Commissioner Eastman dissented in part, expressing views which later became the law by virtue of the decision of this court in *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567 (1947). His opinion contains an excellent discussion of the development of reshipping and proportional rates and the application of section 2 to such rates. He also foresaw the problem which would arise in connection with ex-truck rates. 248 I.C.C. at 323-324.

a restriction against ex-barge traffic violated section 2 of the Act.

Following the decision in *Mechling,* the rail carriers restored the application of the proportional rates to ex-barge grain, the same as on ex-rail and ex-lake grain, and that provision has remained substantially the same up to the present time.[5]

Proceedings before the Commission

Count II of the Board of Trade's complaint alleged that the restriction of the reshipping or proportional rates against ex-truck traffic was unlawful in violation of sections 2 and 3(1) of the Act.

After a hearing on the Board of Trade's complaint, the administrative law judge (ALJ) issued an initial decision (RR Pet., App. D). After reciting the history of the rates, the ALJ discussed at length the decisions in *Mechling* and *James McWilliams Blue Line* v. *United States,* 100 F. Supp. 66 (1951), affirmed per curiam in *Interstate Commerce Commission* v. *James McWilliams Blue Line,* 342 U.S. 951 (1952), and found that the factual situation here presented could not be distinguished from the *Blue Line*

[5] The tariff item in question, paragraph (a) of item 520 series of the eastern grain-rate tariff covering the application of the reshipping or proportional rates from Chicago, specifies (RR Pet., p. a-4):

> Rates apply as re-shipping or proportional rates applicable on traffic reaching the reshipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point. Rates also apply on through billed shipments not stopped in transit at re-shipping points subject to this application.

This is the provision found by the Commission and the Court of Appeals to be discriminatory against ex-truck traffic in violation of section 2 of the Act.

and *Mechling* cases. He further found that all wheat, ex-rail, ex-lake, ex-barge, and ex-truck goes into the same elevators; that it loses its identity as far as mode of transportation is concerned; that the issue is not a matter of physical transportation, but of the application of the inbound billing; that it makes no difference to the outbound railroad how the wheat arrived; that switching billing is common and is permitted by the rail tariffs; that the service of the eastern railroads is exactly the same whether the inbound movement was by rail, water, or truck and costs the same; and that the restriction has inhibited and damaged the shippers in the conduct of their businesses of buying and selling wheat and wheat products and in the shipping thereof. He ordered the railroad defendants to remove the discrimination. In view of his finding under section 2, he did not consider the section 1 and section 3(1) issues (RR Pet., pp. a-25-30).

At this point, several western railroads (operating from the west into Chicago), who were not named as defendants, sought and were permitted leave to intervene. Three shippers also sought and were granted leave to intervene. None of them is a party to the court proceedings. Thereafter another shipper (also not a party to the court proceedings) sought and was granted leave to intervene. The American Bakers Association, The Board of Trade of Kansas City, Missouri, Inc., and Anheuser-Busch, Inc., petitioners here, never sought leave to intervene in the Commission proceeding and they were not parties to that proceeding. They were, however, permitted to intervene in support of the railroad petitioners in the court below.

The Commission adopted the initial decision of the ALJ (RR Pet. App. C). The court of Appeals affirmed (RR Pet. App. A).

ARGUMENT

I.
THE PETITIONS HEREIN PRESENT NO SUBSTANTIAL QUESTIONS WARRANTING REVIEW.

A. The alleged disruption of the rate structure does not present a substantial question for review.

Assuming, *arguendo,* that a disruption of the wheat-rate structure would occur, that presents no substantial question for review by this court. Every change in rates is *pro tanto* a disruption of the theretofore prevailing rate structure. This is no ground for preventing such changes. Nor is it any ground for review of such changes by this court, no matter how important the particular rate structure may be. Predictions of dire consequences from such changes are common, but often, as here, they are chimerical and illusory. When and if such issues should arise, the Commission has power to keep them in bounds. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, 507, 509 (1935).

Certainly the fact that a *pro tanto* disruption of a rate structure might occur has never been held to be a reason for the maintenance of unlawful rates. This point was specifically considered and ruled on in the only way possible by the District Court in *Blue Line,* 100 F. Supp at 70-71. The Court of Appeals also considered this same argument and properly ruled adversely to petitioners (p. 1191, n. 9, RR Pet., p. a-11).

Petitioners' assertions that it is undisputed that a serious disruption of the rate structure will result from the decision herein are not correct. The Board of Trade strongly disputes such assertions. All the petitioners are fond of quoting the famous remark of the Commission in *Grain and Grain Products,* 164 I.C.C. 697 (1930), likening the

rates on wheat to a huge blanket covering the country, a pull on any part of which would be felt in every other part of the country. But that was 47 years ago and the eastern grain-rate structure today bears little resemblance to what it was in 1930. Whatever monolithic characteristics the grain-rate structure may have had in 1930 (seventeen years before *Mechling*) are long since gone. The intense competition between rail, lake, barge, and motor carriers, the *Mechling* decision itself, the opening of the Saint Lawrence Seaway, and the advent of multiple-car, unit-train, annual volume, and drastically reduced special export rates has changed all that. In fact to even refer to "a wheat-rate structure" or "a grain-rate structure" is a misnomer. There is no such thing. There is only a melange of various rate adjustments and individual rates.

Furthermore no serious disruption of rates is likely to occur; certainly it need not occur. The railroads, if they choose, can comply with the order in the same manner as they did in the *Mechling* case, by making the proportional rates applicable on ex-truck grain the same as on ex-rail, ex-lake, and ex-barge grain. That would be the normal way of complying with the order, which would cause little, if any, disruption of rates. If, instead, the railroads choose to comply with the order by cancelling all proportional rates, the time to consider those issues is when they arise. The Commission was not faced with those issues in this case, and it would have been improper for the Commission to conjure up issues which were not presented. If the railroads, in the future, attempt to seriously disrupt the rates, purporting to rely on compliance with the order in this case as justification therefor, all shippers and receivers, including those who are petitioners here, will have full opportunity to be heard by the Commission, and the Commission has full authority to keep such rate changes within bounds.

Finally, if the petitioners other than the railroads are so concerned about disruption of the rate structure, why did they not take part in the Commission proceeding? The American Bakers Association, Anheuser-Busch, and The Kansas City Board of Trade, did not seek to become parties to the Commission proceedings, although they all had full knowledge of its existence.[6]

The Commission and the Court of Appeals have given due consideration to the public interest and have obviously reached the right result.

B. The alleged misinterpretation of Mechling and Blue Line does not present a substantial question for review.

The administrative law judge, the Commission, and the Court of Appeals all held, without dissent, that the restriction of the proportional rates against ex-truck traffic violates section 2 of the Act. In so holding all of them agree that the case is governed by the holdings of this court in *Mechling* and *Blue Line,* the factual situation here being indistinguishable from those there presented.

In *Mechling* this court held that the rail proportional rates from Chicago to the east which applied on ex-rail and ex-lake grain but not on ex-barge grain, discriminated against barge traffic in violation of section 2. Some of the ex-barge grain involved in that case was subject to regulation by the I.C.C. and some was not, but the court made

[6] The Kansas City Board of Trade indicates (Pet., p. 8) that it and Anheuser-Busch and others "requested" the Commission to reconsider its refusal to grant review. Those petitioners and several others named were not parties to the Commission proceeding and had no standing therein. Their "requests," which were in violation of the Commission's rules, were prompted by the threat of the eastern railroads to cancel all proportional rates. The petitions for reconsideration filed by those parties who were interveners were denied by the Commission's order of February 17, 1977.

no distinction between unregulated and regulated traffic, and the decision of the lower court in *Blue Line,* affirmed per curiam by this court, specifically held that the principles established in *Mechling* applied equally where all the ex-barge traffic was unregulated.[7] The application of those principles in the case of ex-truck traffic naturally follows.

Section 2 of the Act prohibits the railroads from charging one person more than another for (1) a like and contemporaneous service in the transportation of (2) a like kind of traffic (3) under substantially similar circumstances and conditions.

That all those elements are present here is clearly demonstrated by the findings of the ALJ, referred to *supra,* pp. 8-9. The ex-truck wheat is exactly the same as ex-rail, ex-barge, or ex-lake and the service of the railroads east of Chicago is exactly the same no matter by what mode of transportation the wheat arrived at Chicago. It is settled construction that the circumstances and conditions referred to in section 2 are those relating to the transportation or carriage and not to circumstances arising before or after such transportation. *Wight* v. *United States,* 167 U.S. 512, 518 (1897); *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.,* 220 U.S. 235, 253-254 (1911); *Seaboard Air Line Railway Co.* v. *United States,* 254 U.S. 57, 61-62 (1920); *Atchison, T. & S. F. R. Co.* v. *United States,* 279 U.S. 768 (1929).

There can be no doubt but what the Commission and the Court of Appeals correctly interpreted the decisions in *Mechling* and *Blue Line* and, applying the principles of those cases to the facts here, correctly found that the rates involved are unduly discriminatory in violation of section 2.

[7] The applicable tariff item resulting from *Mechling* made no distinction between regulated and unregulated water traffic. See *supra,* p. 8, n. 5.

The petitioners attempt to avoid the force of *Mechling* and *Blue Line* by arguing that those cases involved "through routes" while the present case does not. This argument has no basis in either fact or law and presents no substantial question warranting review by this court for a number of reasons.

First, the Court of Appeals correctly found that this argument "is beside the point." (P. 1191, RR Pet., p. a-10). It is well settled that, even though proportional rates are parts of through rates (i.e., combinations of locals and proportionals), they are independent, separately established rates, and they must independently meet the standards of lawfulness provided by the Act. *Great Northern R. Co.* v. *Sullivan,* 194 U.S. 458, 462 (1935), *Cairo Board of Trade* v. *C., C., C. & St. L. Ry. Co.,* 46 I.C.C. 343, 350-351 (1917); *Phoenix Utility Co.* v. *Southern Ry. Co.,* 173 I.C.C. 500, 503-504 (1931); *Refund Provisions, Lake Cargo Coal,* 299 I.C.C. 659 (1957).

As this court said in *Atchison, T., & S. F. R. Co.* v. *United States,* 279 U.S. 768, 775-776 (1929):

> We have no occasion to consider the issue of fact whether there was in existence when the Santa Fe filed its proposed tariff a through route from Dodge City via the Southern from Kansas City; nor need we consider the issue of law whether, if there was such a route in existence, the Commission would have been powerless, by reason of ¶4 of §15, to prevent the Santa Fe's withdrawal from it. For we are of opinion that, although the Santa Fe brought the grain into Kansas City, there is nothing in the situation which precluded the Commission from canceling the Santa Fe's proposed tariff as being unreasonable.

Second, there is nothing in the *Mechling* opinion which supports petitioners' arguments in any way. The court did not suggest that it even considered whether any through routes were in existence, and it based its opinion

squarely on section 2 of the Act. 330 U.S. at 576-577. Furthermore, *Mechling* could not possibly have rested on any such ground as petitioners suggest because, in the proceeding which led up to *Mechling,* the Commission had specifically declined to order joint routes and rates. *Grain Proportionals, Ex-Barge to Official Territory,* 262 I.C.C. 7, 32 (1945).

Third, as the ALJ found (RR Pet. p. d-29-30), which finding the Commission adopted, there is no factual basis for differentiating between ex-rail, ex-lake, ex-barge, and ex-truck wheat. Petitioners have never suggested any factual basis for their argument. They simply assert that ex-rail, ex-lake, and ex-barge traffic moves on through routes, but ex-truck traffic does not.[8] This is apparently on the theory that, because the proportional rates presently apply on ex-rail, ex-lake, and ex-barge wheat, that traffic moves on through routes, but, because such rates do not presently apply on ex-truck wheat, that traffic does not move on through routes. This puts the cart before the horse and amounts to no more than saying that whether the proportional rates are discriminatory depends on the willingness of the railroads to voluntarily apply them. This argument is even more absurd in the case of ex-barge traffic, where the proportional rates apply only because this court found the restriction against barge traffic to be in violation of section 2.

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[8] "Through routes" is a technical term used in the Act (e.g. §§ 1(4), 15(3), 15(14), and 307(d)), although it is often used in a general non-technical sense. On the other hand "through traffic," "through movement," "through shipment," "through transportation," are non-technical terms not used in the Act. They generally mean only that the traffic has moved via more than one carrier. "Through route" is not synonymous with any of those terms, although petitioners attempt to create the impression that these terms, all of which they use without definition, are interchangeable.

Fourth, the mere fact that section 307(d) of the Act, added by the Transportation Act of 1940, conferred on the Commission the power to establish joint rail-barge routes in certain cases has nothing to do with the situation. The Commission has never attempted to exercise the power with respect to grain and, in any event, the Commission's power to establish joint barge-rail rates does not extend to traffic which is not subject to I.C.C. regulation. All of the ex-lake traffic from the turn of the century to today has always been unregulated. Barge traffic was unregulated up to 1940. From 1940 to 1973, barge grain traffic was exempt from regulation unless it was handled in "mixed tows," and since 1973 it has been totally exempt even when handled in mixed tows.[9]

We know of no case—and petitioners have cited none—where the Commission has found that a combination of a regulated rail movement with an exempt barge, lake, or motor movement has created a through route as defined by the Commission.[10] In fact, it would appear that by definition such a situation could not exist. If there were a

[9] Under section 303(b) of the Act, 49 U.S.C. §903(b), as it read at the time of *Mechling,* grain was exempt when the cargo space of the vessel (a tow in the case of barges) was used for the carrying of not more than three bulk commodities. Under that provision the barge lines had the option of handling the grain as either an exempt or a regulated commodity, whichever served their purpose in the circumstances. Nearly all grain, however, was in fact handled as an exempt commodity. Effective December 27, 1973, by P.L. 93-207, 87 Stat. 838, bulk commodities were made exempt from regulation, whether or not more than three such commodities were handled in a single vessel.

[10] Yet rail proportional rates in connection with such movements are common. See *supra,* p. 4.

common arrangement for a through route within the meaning of *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.,* 226 I.C.C. 7, 17, then it would necessarily follow that the entire transportation would be subject to regulation under part I of the Act, 49 U.S.C. §1(1)(a).[11]

Finally, nothing in the Act suggests that ex-rail, ex-lake, and ex-barge traffic are to receive a preference over ex-truck traffic. On the contrary, the national transportation policy (49 U.S.C. Prec. §1) directs the Commission to provide for "fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each."

We submit that petitioners' contentions that the Commission and Court of Appeals misinterpreted *Mechling* and *Blue Line* have no substance whatever.

II.

THERE IS NO CONFLICT IN DECISIONS WARRANTING REVIEW BY THIS COURT.

Petitioners allege that the decision below is in conflict with *Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U. S. 671 (1943). On this point the Court of Appeals said (p. 1191, RR Pet. pp. a-10-11):

> We do not view *Inland Waterways* as being inconsistent with *Mechling* and *Blue Line.* In that case the petitioners focused more on the origin of the grain as the basis of the discrimination than on the mode of transportation into Chicago. Both the Commission

[11] See *Chicago, B & Q. R. Co.* v. *Chicago & E. I. R. Co.,* 322 I.C.C. 138 (1964) for an example of such a case, where a lake carrier and a railroad voluntarily published a joint through rate on coal over a joint through rail-lake route, although the lake portion of the move, standing alone, would have been exempt from regulation.

and the Supreme Court stated that their holdings did not connote approval of the rates, but only that petitioners' assertions could not be sustained. In any event, to the extent that *Inland Waterways* is inconsistent with *Mechling* and *Blue Line,* we are bound by the Supreme Court's latest pronouncements as reflected in the latter.

Whether one thinks there is a conflict between this case and *Inland Waterways* and, if so, to what extent, depends on what one thinks was decided in *Inland Waterways.* The *result* in *Inland Waterways* was to permit the railroads to continue to restrict their proportonal rates against application on ex-barge traffic while permitting their application on ex-lake and ex-rail traffic. The court, however, never specifically addressed that issue, and it specifically disclaimed approval of the rates. 319 U.S. at 691. Rather the court was more concerned with the barge lines' argument (319 U.S. at 683) that—

> [T]o deny the ex-barge grain the benefit of proportionals sought to be cancelled was necessarily unlawful since the physical carriage beyond Chicago was substantially the same no matter where the grain originated.

With respect thereto the court observed (319 U.S. at 684):

> As the Commission correctly observed with reference to the first contention, 'to adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned.'

Finally, after making it clear that its opinion did not constitute approval of the specific rates involved, the court, in referring to the Commission's ultimate finding

that the schedules were shown to be just and reasonable, said (p. 686):

> Read in the context, we think it meant only that the proposed schedules could not be struck down upon the erroneous view advanced by the protestants. The finding of the Commission that the proposed schedules 'are not shown to be otherwise unlawful' is, we think, to be similarly read. This form of finding has been held by the Commission not to constitute an approval or a prescription of the rates under suspension.

Petitioners would read *Inland Waterways* as specifically approving the right of railroads to make application of their proportional rates dependent on the *mode* of transportation to Chicago. We do not so read *Inland Waterways,* but if it can be so construed, then such holding was clearly overruled by *Mechling* and *Blue Line,* both of which specifically held that, under section 2 of the Act, no such distinction could be made.[12]

Petitioners would distinguish *Mechling* from *Inland Waterways* also by reason of the passage of the Transportation Act of 1940, giving the Commission the power to establish joint rail-water but not rail-motor rates and routes. This is simply another version of the "through route" argument. There is no substance to that argument

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[12] Insofar as differences in rail proportional rates for the same service result from differences in the origin or destination of the non-rail haul, such differences are still recognized as proper. In *Refund Provisions, Lake Cargo Coal, supra,* the Commission held, and quite properly so, that it did not construe *Mechling* or *Blue Line* to prevent proportional rates "which may vary depending upon the origin or destination of the traffic". 299 I.C.C. at 662.

for reasons which have previously been stated (*supra,* pp. 13-17).[13]

CONCLUSION

For reasons above stated, we submit that the petitions here set forth no substantial questions of law for review by this court and that the decision below was correct in all respects. The petitions should be denied.

Respectfully submitted,

HAROLD E. SPENCER
20 North Wacker Drive
Chicago, Illinois 60606

Attorney for Respondent,
Board of Trade of the City
of Chicago

BELNAP, MCCARTHY, SPENCER,
SWEENEY & HARKAWAY
Of Counsel

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[13] A somewhat similar argument is made by petitioner American Bakers Association which argues (Pet., pp. 20-22) that the decision here conflicts with section 6(11)(b) of the Act. This issue was not raised before the Commission or in the court below. It is a sufficient answer to this argument to note that the proportional rates here involved were not fixed under section 6(11)(b) so no question could possibly arise in this case as to any such conflict. Nor do we see how it could ever arise. The decision here was based on section 2. Both section 2 and section 6(11)(b) have co-existed for many years, although in *Mechling,* this court struck down special ex-barge proportional rates on the basis that they were discriminatory to ex-barge traffic under section 2 of the Act. In any event, whatever power the Commission may have under section 6(11)(b) is not affected in the slightest by the decision here.

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v.

THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY

John J. Paylor
P. O. Box 6419
2700 Terminal Tower
Cleveland, Ohio 44101

John A. Daily
1138 6 Penn Center Plaza
Philadelphia, Pa. 19104

Peter J. Hunter, Jr.
8 North Jefferson Street
Roanoke, Virginia 24042

Counsel for Eastern Railroads

Howard J. Trienens
R. Eden Martin
James W. Jandacek
One First National Plaza
Chicago, Illinois 60603

Smith R. Brittingham, Jr.
304 Cavalier Drive
Virginia Beach, Virginia 23451

Joseph D. Feeney
222 South Riverside Plaza
Chicago, Illinois 60606

Counsel for Western Railroads

September 22, 1977

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PETITIONERS' REPLY

I. Reply to Memorandum of Federal Respondents

The Memorandum submitted by Federal Respondents in opposition to the petitions for a writ of certiorari underscores the urgent need for this Court to review the decision of the Court of Appeals below.

1. Federal Respondents characterize the Commission's decision in this case as based on a holding that the proportional rates at issue are "unreasonably" or "unjustifiably" discriminatory (p. 2). They then seek to square that holding with this Court's decision in *Inland Waterways*, which they construe as sustaining "the Commission's discretionary determination" that the tariffs there at issue were not unreasonable (p. 4).

This argument badly misconstrues both the Commission's holding in this case and this Court's decision in *Inland Waterways*.

Unlike many other agency decisions which this Court is asked to review, the Commission's decision in this case was not based upon an exercise of discretion or expertise. It was based on the legal theory that this Court's decision in *Mechling* (followed later in *Blue Line*) construing Section 2 of the Interstate Commerce Act *compelled* a holding that the proportional rates at issue here are unlawful. On the basis of this same theory, the Court of Appeals upheld the Commission's decision (R.R. App., pp. a-2–a-3, a-10).

The relevant facts in this case are undisputed and exactly the same as in *Inland Waterways* and *Mechling*. In all three cases, (1) grain moved from country origins into Chicago, (2) the grain was stored or processed in Chicago, and (3) the grain then moved outbound via rail to destination in the East. In each case country origins were the same (or in the same rate group), and ultimate destinations were the same (or in the same rate group).[1] The physical characteristics of the outbound rail movement from Chicago were the same regardless of how the grain arrived at Chicago.

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[1]Federal Respondents misstate *Inland Waterways* when they assert (p. 4) that the Commission did not consider in that case whether the ex-barge shipments were from the same ultimate country origins as the ex-rail shipments. Both in *Inland Waterways* and in this case, grain originated at the *same* country origins (or origins within the same rate group)—then moved via barge or railroad to Chicago—then via rail to the *same* destinations (or destinations in the same rate group). As to this grain, what differed was *not* the origins or distinations, but the nature of the movement—either through (rail-rail), or non-through (barge-rail).

The rate structure involved in *Inland Waterways* and the railroads' proposals to change it may be summarized as follows:

(footnote continued on next page)

The only relevant difference that distinguishes the cases is that:

(1) In *Inland Waterways* the barge-rail movement was *not* a through movement—because at that time barges and railroads did not maintain through routes or through rates with each other;

(2) In *Mechling* the barge-rail movement *was* a through movement—because after the 1940 Act became effective, the barges and railroads were required to, and did, enter into and maintain through routes and rates with each other; and

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(1) On grain shipped from Chicago to "Trunk-line" and "New England" territories "the proportionals did not vary with the origin of the grain" (319 U.S. at 676). These proportionals applied to both ex-rail and ex-barge grain from the same country origin points (or points in the same rate groups), and the railroads sought to cancel the proportionals from the ex-barge grain and to charge the higher local rates instead (319 U.S. at 676).

(2) On grain shipped from Chicago to "Central Territory" so-called "Northwest proportionals" applied on ex-barge grain no matter where the grain originated. Three different sets of proportionals applied to ex-rail grain, with the level of the proportional varying with the origin of the grain. To some destinations in Central Territory these ex-rail proportionals were lower than the ex-barge proportionals (the "Northwest" proportionals), but the barge lines made "no complaint" of this and were "content to assert that they [were] entitled to the Northwest proportionals as to such grain" (319 U.S. at 674–75; *see also* 246 I.C.C. at 365).

The controversy as to rates to Central Territory (which the Court of Appeals below regarded as the principal area of dispute, R.R. App., pp. a-7–a-8), was actually the least important aspect of the case, for Mr. Justice Black noted in *Mechling* that "this rate controversy chiefly revolves" around shipments to Trunk-Line and New England territories (330 U.S. at 570, n.1) and did not even discuss the rates to Central Territory.

(3) In this case the truck-rail movement is *not* a through movement—because under the 1935 Motor Carrier Act, the trucks and the railroads are not required to, and do not, enter into through routes and rates with each other.

The crux of this case is that the Commission's hearing examiner focused only on the conceded identical character of the physical characteristics of the outbound rail movement from Chicago, and gave no effect to the fact that the truck-rail movement is not a through movement. Based solely on the identical physical character of the outbound rail movement, the hearing examiner and the Commission ruled that, applying this Court's decision in *Mechling*, it is a violation of Section 2 to charge different rates for the outbound rail movement. The Commission arrived at this decision not by exercising its expert discretion, but by applying what it erroneously believed was the mandate of this Court in *Mechling*—a mandate it construed as requiring invalidation of the proportional rates *as a matter of law*.

It is true that in *Mechling* the outbound rail movements were physically the same whether the inbound movement was by barge or rail. But that physical similarity is *not* what rendered the proportional rates there unlawful under Section 2. In *Inland Waterways* the outbound movements had also been physically the same, but this Court did not invalidate the proportional rates in *Inland Waterways*. The crucial difference was that in *Inland Waterways* the barge-rail movement over Chicago was not a through movement; thus the movements being compared to see if there was a Section 2 violation—*i.e.*, the local (barge-rail) movements and the through (rail-rail) movement—were not "like".[2] In *Mechling* the barge-rail movements had become (by virtue of the 1940

[2] *I.e.*, not for "a like and contemporaneous service in the transportation of a like kind of traffic" under Section 2.

Act) a through movement; thus the movements being compared—i.e. the through (barge-rail) movement, and the through (rail-rail) movement—were now "like" for purposes of Section 2.

Federal Respondents, like the Commission and the Court of Appeals, have misread this Court's decisions; and their attempt to defend the holding below, based on the theory that the Commission was merely exercising its "discretion" in determining what sorts of discriminations are "unreasonable" or "unjustifiable," reflects their fundamental misunderstanding of what the Commission has done. Indeed, the very assumption that the Commission has "discretion" to permit or strike down proportional rates under Section 2 supports the position of the railroads, because the inherent premise of that assumption is that some proportional rates applied to through movements (where higher local rates apply to physical identical local movements) *would be lawful* under Section 2. Yet the decisions of the Commission and Court below are based on the *precisely opposite legal premise* that all such different rates (applicable to the physically same or similar movements) would be unlawful under Section 2. Federal Respondents' memorandum thus emphasizes the need for this Court to review this case to correct the erroneous readings of this Court's decisions. The need for such review is particularly compelling where, based on its erroneous reading of *Mechling*, the Commission (with the sanction of the Court below) is proceeding to disrupt the national grain rate structure on the theory that such disruptive consequences are irrelevant because they are compelled by this Court's 30-year old decision in *Mechling*.

2. Federal Respondents in their memorandum (p. 3) also quote and rely upon the "observation" of the Court of

Appeals that it is "beside the point" that the truck-rail movement consists of two local (non-through) movements to, and then from, Chicago; whereas the rail-rail and barge-rail movements are through movements from origin, through Chicago, to ultimate destination. The Court of Appeals' "observation," and Federal Respondents' reliance on it, illustrate the fundamental character of the legal error upon which the Court of Appeals' decision is premised.

There is no more firmly established principle in transportation law than that a through rate (applicable to a through movement from point X, through point Y, to point Z) may be *less than* the sum of the local rates (applicable to local movements from X to Y, and from Y to Z). (*See* Petition for Certiorari of Railroad Petitioners herein, pp. 5–6.) This principle underlies the national grain rate structure and the rate structures applicable to other commodities. The principle applies despite the fact that inevitably a portion of the through movement is exactly the same, in terms of the physical characteristics of that movement, as each of the local movements.

It is this principle which has supported application of proportional rates lower than local rates since the very beginnings of the railroad industry, and since the Interstate Commerce Act (and Section 2 thereof) were written into law. Proportional rates are portions of through rates (*see* cases cited in Petition for Certiorari herein, p. 6). Because a through rate may be less than the sum of applicable locals, it necessarily follows that a portion of a through rate may be less than the applicable local rate covering the same physical movement. To deny this conclusion is to deny the fundamental principle from which it is derived. For Federal Respondents to contend (as the Court of Appeals below *held*) that it is "beside the point" whether a movement is local or through

is to upset a century of transportation law and practice, attribute to Congress a useless purpose in enacting the 1940 Act (because the barges would be entitled to "equal treatment" under Section 2 without the 1940 Act), frustrate a distinction carefully made by Congress when it passed the 1935 Motor Carrier Act (because even though trucks are not entitled to through route status thereunder, they could obtain through route treatment under Section 2), contradict this Court's square holding in *Inland Waterways*, and render pointless the entire discussion in this Court's opinion in *Mechling* as to the terms, history, and effect of the 1940 Act on the status of water carriers.

The disruptive effect of the decision below on the nation's grain rate structure will be severe.[3] It will lead to economic hardship for the railroads, many shippers, and many communities. The flow of grain from country origins through intermediate marketing and processing points to ultimate destinations will be interrupted and diverted—to the great disadvantage of those in the farming, elevator, processing, transportation, and grain trading businesses who have made heavy investments premised on existing patterns of grain flow. These consequences will be inflicted—not because the Commission thinks they are in the public interest, or because it has even considered them—but because the Commission and the Court of Appeals believe they are compelled by this Court's decision in *Mechling*.

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[3]The Commission in its recent Annual Report to Congress (90th Annual Report, p. 34 (1976)) acknowledged that its decision herein would "affect the entire grain rate structure" applicable to grain movements from the West or Midwest to Eastern destinations. See also the Commission's Special Projects Staff statement describing this case as causing "a significant modification of the historic pattern of gathering rates from country origins and intermarket proportionals. . . ." (Opening Statement of Special Projects Staff in Ex Parte No. 270, Sub-No. 9, p. 2).

In these circumstances, it is difficult to conceive of a case more deserving of review by this Court.

II. Reply to Brief for Respondent Chicago Board of Trade

Chicago Board of Trade advances very different, but no less invalid, reasons why it believes this Court should not review the decision below. The thrust of its argument is an attempt to show that the decision below does not conflict with this Court's decision in *Inland Waterways*. The attempted showing is demonstrably erroneous.

1. Chicago Board argues that if *Inland Waterways* is construed as upholding proportional rates against Section 2 attack, then it was overruled by *Mechling* (Chicago Brief, p. 19). However, this contention was decisively rejected by this Court in *Mechling*. Mr. Justice Black *distinguished Inland Waterways* on the precise ground which Railroad Petitioners have contended is the controlling difference between the two cases. Mr. Justice Black noted that "in the original proceedings before the Commission" leading to *Inland Waterways*, "the last evidence was heard and the record was closed before the 1940 Transportation Act became a law." By contrast, "the present proceedings are fully governed by the 1940 Act" (330 U.S. at 574 n. 7).

Nothing in the *Mechling* opinion provides any indication that *Inland Waterways* was being overruled. Mr. Justice Jackson, who had written the majority opinion in *Inland Waterways* four years earlier, dissented in *Mechling* but did not suggest that *Inland Waterways* was being overruled and, in fact, did not even mention that case.[4] Likewise, Mr. Justice Black, who had dissented in *Inland Waterways* on the ground that

[4]Mr. Justice Jackson based his dissent on his view that provisions of the 1940 Act had been wrongly applied (330 U.S. at 584–85).

the 1940 Act should have been applied at that stage of the litigation (319 U.S. at 692, 697–703) because "the Commission should have felt itself bound" by that Act (*id.* at 701), did not suggest that the holding of *Inland Waterways* was being overruled. Rather, he recognized that the 1940 Act—by giving barges the same through-route status as railroads—had changed the result as to water carriers.

In *Inland Waterways*, Mr. Justice Jackson noted the failure of the barge lines to rely on the 1940 Act before the Commission and suggested that they return to the Commission and accept the Commission's own invitation to commence a "proper proceeding" in which it might "prescribe proportional rates on the ex-barge traffic lower than local rates or joint rail-barge rates lower than the combinations" (248 I.C.C. at 311) (319 U.S. at 690–91). Mr. Justice Jackson noted that the difficulties faced by the barge lines in presenting their case in *Inland Waterways* might not be critical in a reopened proceeding because with respect to water carriers, "*The applicable law has changed*" (*id.* at 690) (emphasis supplied).[5]

[5]When the barge lines returned to the Commission after losing in *Inland Waterways*, the Commission recognized that the provisions of the 1940 Act specifically designed to change the status of the barge lines had been invoked and would now form the basis for decision (262 I.C.C. at 8–9). Accordingly, the issues in the new proceeding were drastically different from the issues in *Inland Waterways*. The question no longer was whether the railroads could charge ex-barge grain (which now moved in a barge-rail through movement) the local rates (the railroads recognized that they could not; *see* 262 I.C.C. at 25), but whether the ex-barge proportionals had to be the same as the ex-rail proportionals or instead could be somewhat higher. The Commission settled on a "differential" which made the ex-barge proportionals 3 cents per hundredweight higher than the ex-rail proportionals. This action was based direct-

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Given this Court's own distinction between *Inland Waterways* and *Mechling*, and the consistent recognition by this Court and the Commission that *the 1940 Act* changed the result in *Inland Waterways*, there is no basis whatever for Chicago Board's contentions that *Inland Waterways* was overruled in *Mechling*. No decision of the Commission or the courts has ever suggested such a possibility, and the continuing force of *Inland Waterways* has repeatedly been recognized.[6]

2. The second line of argument pursued by Chicago Board is that even if *Inland Waterways* was not overruled, this Court's decision in that case did not recognize a distinction under Section 2 between through and local movements but rather turned upon a finding that there was no geographic discrimination; alternatively, Chicago Board argues that this Court made no Section 2 holding at all in that case.

These contentions are transparently without merit. *Inland Waterways* squarely upheld the lawfulness under Section 2 of

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ly on the provisions of the 1940 Act specifically applicable to barge lines—not on Section 2 as it applied to the facts as they stood prior to the 1940 Act.

Mr. Justice Black's opinion for the Court in *Mechling* held this 3 cent differential unlawful. The opinion included an extensive discussion of the provisions of the 1940 Act (330 U.S. at 574–78) and a recognition that the barge-rail shipments were now "through movements" over "through routes" (330 U.S. at 570–71). These essential changes in law made the Section 2 holding in *Mechling* —that the *through* barge-rail transportation should receive the same proportional rates as the *through* rail-rail transportation—essentially different from, and entirely consistent with, the holding in *Inland Waterways* that Section 2 did not require the extension of proportional rates to *local* movements.

[6] *See, e.g., Koppers Co., Inc.* v. *United States*, 166 F. Supp. 96, 101-02 (W.D. Pa. 1958); *Consolidated Edison Co., Inc.* v. *Virginian Ry.*, 292 I.C.C. 23, 26 (1954).

restricting proportional rates to through movements and not applying them to local movements, despite the identical physical characteristics of the outbound rail movements from Chicago. This Court's discussion of the history and basis of proportional rates was based directly on their application to through rather than local traffic and did not indicate that the issue was limited to geographic discrimination (319 U.S. at 684–85). And the issues in *Inland Waterways* did not involve any contentions of geographic discrimination.[7] The barge lines were there resisting the railroads' proposal to apply the local rates to grain brought to Chicago by barge while applying the lower proportional rates to grain brought to Chicago by rail. The barge lines' argument there was identical to the argument made by Chicago Board of Trade in this proceeding—that since the physical carriage beyond Chicago was the same for both ex-barge and ex-rail grain, for that reason the rates necessarily had to be the same (319 U.S. at 683). That contention was squarely rejected by this Court (*id.* at 684–85).

Respondents also suggest that this Court in *Inland Waterways* made no Section 2 holding at all because the Commission did not approve or prescribe the rates proposed by the railroads there. However, even though the Commission and this Court did not decide all possible issues as to the reasonableness or lawfulness of the proposed rates, they *did* decide the Section 2 issue. The barge lines had not argued all possible issues of reasonableness or lawfulness; they had "pitched their case" (319 U.S. at 683) on the argument that the proportional rates violated Section 2 because they were not applied to the non-through barge-rail movements, even though the outbound rail service from Chicago performed in connection with through movements was physically the same

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[7] *See* pp. 2–3, n.1 *supra*.

as in the local, non-through movements. This Court in *Inland Waterways* (like the Commission) rejected that argument (319 U.S. at 684–85). Its square holding to that effect, based on its construction of Section 2, is no less significant because it did not reach or resolve other issues which might have been reached if the Commission had prescribed the rates at issue.

3. Chicago Board's third line of argument is an attempt to bolster infirmities in the Court of Appeals' decision by mischaracterizing it and advancing arguments and factual assertions which were not even mentioned by the Court of Appeals—an approach which only serves to confirm that the grounds on which the Court of Appeals did rely were incorrect.

Chicago Board attempts to avoid the effect of the ruling below by arguing that the Court of Appeals held that it was "beside the point" whether the rail-rail or barge-rail shipments moved over "through routes" (Chicago Board Brief, pp. 3, 14). However, the Court of Appeals made the significantly broader holding that it was "beside the point" that "the truck-rail transportation of grain is a *local movement* whereas the rail-barge, lake-rail movement is a *through movement*" (R.R. App., p. a–10) (emphasis supplied). As shown above (*supra*, pp. 5–7), that holding of the Court of Appeals is contrary to a century of rate practice under the Interstate Commerce Act, numerous decisions of the Commission, and *Inland Waterways*.[8]

[8]Chicago Board misses the point of the distinction between through and local movements by arguing that "whether the proportional rates are discriminatory depends on the willingness of the railroads to voluntarily apply them" (Chicago Brief, p. 15). The local rates do *not* apply *solely* to ex-truck traffic. They also apply to *all other* local traffic, including grain grown locally at

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Unlike Federal Respondents, Chicago Board declines to attempt an explicit defense of this erroneous holding of the Court of Appeals, but rather attempts to support the decision below on the factual assertion that no through routes over Chicago exist on rail-rail movements or on movements between the railroads and the barge lines and lake vessels (Chicago Brief, p. 15).

The opinion of the Court of Appeals did not question the existence of rail-rail or barge-rail through routes over Chicago, and its decision was certainly not founded on the factual premise asserted by Chicago Board. Moreover, existence of such through routes is established by the maintenance of proportional rates applicable to the eastbound movement of ex-rail, ex-barge, and ex-lake wheat.[9] These

Chicago, grain brought to Chicago by rail under intrastate rates, and grain brought to Chicago by rail which has forfeited its transit privilege by remaining in Chicago elevators so long as to lose its status as part of a through movement. There is nothing "discriminatory" about treating all local movements the same by charging them the local rates, while treating all through movements the same by charging them the proportional rates.

[9]This Court held in *Thompson* v. *United States*, 343 U.S. 549, 557 (1952), that a through route is established by publication of a proportional rate applicable to through traffic forwarded via another carrier.

Chicago Board cites two cases in an effort to avoid the holding in *Thompson*. In the first, *Chicago and Wisconsin Points Proportional Rates*, 10 M.C.C. 556 (1938), the Commission found that the rates at issue were not proportional rates and ordered them cancelled (10 M.C.C. at 562, *aff'd*, 17 M.C.C. 573, 575–76 (1939)). This action was ultimately affirmed by this court. *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344 (1940). Here there is no dispute that the rates from Chicago to the east *are* proportional rates. In the second case, *Refund Provisions, Lake Cargo Coal*, 299 I.C.C. 659 (1957), the Commission found that the traffic "comes to rest" at reshipping

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through routes are required by law[10] as recognized by this Court's mandate in *Mechling*.[11]

Chicago Board also suggests that this proceeding is governed by *Mechling* because of the exemption for water carriage of certain bulk commodities (Section 303(b), 49 U.S.C. §903(b); Chicago Board Brief, pp. 12–13, 16–17 and nn. 9, 11). That exemption has nothing whatever to do with this case. Neither the Court of Appeals nor the Commission based their decisions on the scope of the bulk commodity exemption for barge traffic. Nothing in the Interstate Commerce Act prevents railroads from joining with carriers which haul exempt cargo in through routes.[12] Nothing in the

points and frequently moved outbound "at intrastate rates." The through ex-rail, ex-barge, and ex-lake grain traffic out of Chicago, by contrast, does not "come to rest" at Chicago but rather legally remains in a continuous through movement (*see, e.g., Inland Waterways*, 319 U.S. at 684) and always moves under interstate rates to the east.

[10]Railroads have been required to establish through routes with one another since the Hepburn Act of 1906, and with barge lines and lake vessels since the 1940 Transportation Act (present Section 1(4), 49 U.S.C. §1(4)). They are *not* required to maintain through routes with trucks (49 U.S.C. §316(c)).

[11]Chicago Board's argument reduces to a contention that the railroads have been in violation of the Hepburn Act for more than 70 years and this Court's mandate in *Mechling* for over 30 years by failing to establish through routes with connecting railroads and barge lines. This contention has never before been raised by any railroad or barge line or shipper because, as shown by the tariff provision quoted by Chicago Board (Brief, p. 8 n. 5), the railroads have in fact extended through routes and proportional rates to ex-rail and ex-barge grain.

[12]This Court's many decisions defining the term "through route" contain no indication that through routes cannot be formed with unregulated carriers. *See, e.g., Thompson* v. *United States*, 343 U.S. 549, 556–57 (1952); *St. Louis S.W. Ry.* v. *United States*, 245 U.S. 136, 139 n.2 (1917).

Act causes a through movement over a through route to lose its through character simply because the cargo hauled by one carrier in the through route is unregulated.

Moreover, the protections extended to barge lines in the 1940 Act apply to any "common carrier by water subject to [part III]" of the Interstate Commerce Act,[13] and Chicago Board offers no reason why that status would change according to whether the cargo which such a water common carrier happens to be carrying at any given moment qualifies for the bulk commodity exemption.

CONCLUSION

The controversy in this case turns solely on a question of law relating to the proper construction of this Court's holdings in *Inland Waterways* and *Mechling*. There were no disputed facts to be resolved by the Commission under Section 2, and the Commission did not exercise any transportation expertise or make any discretionary choice between available alternative courses of action. Rather, the Commission based its decision solely on its erroneous view of the legal requirements compelled by this Court's decision in *Mechling*. Based solely on the authority of this Court's decision (which it has badly misconstrued), the Commission has taken a step which will upset the historic grain rate structure—with no consideration of the consequences—because it believes that under

[13]Section 1(4), 49 U.S.C. §1(4). *See also, e.g.*, Section 3(4), 49 U.S.C. §3(4); Section 307(d), 49 U.S.C. §907(d).

Mechling that step is compelled and the consequences are legally irrelevant.

For the foregoing reasons and those set forth in the Railroads' Petition for Certiorari, this Court should issue a writ of certiorari to review and correct the judgment of the Court of Appeals.

Respectfully submitted,

John J. Paylor
P. O. Box 6419
2700 Terminal Tower
Cleveland, Ohio 44101

Howard J. Trienens
R. Eden Martin
James W. Jandacek
One First National Plaza
Chicago, Illinois 60603

John A. Daily
1138 6 Penn Center Plaza
Philadelphia, Pa. 19104

Smith R. Brittingham, Jr.
304 Cavalier Drive
Virginia Beach, Virginia 23451

Peter J. Hunter, Jr.
8 North Jefferson Street
Roanoke, Virginia 24042

Joseph D. Feeney
222 South Riverside Plaza
Chicago, Illinois 60606

Counsel for Eastern Railroads

Counsel for Western Railroads

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